# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1904~~ 1905.

No. ~~230~~ 49.

HAROLD PETRI, CARL BOPP, AND VICTOR POELS, CO-PARTNERS, DOING BUSINESS UNDER THE NAME OF PETRI & COMPANY, PLAINTIFFS IN ERROR,

*vs.*

THE F. E. CREELMAN LUMBER COMPANY AND FRANK E. CREELMAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED JUNE 17, 1904.

(19,398.)

(19,398.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1904.

## No. 298.

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HAROLD PETRI, CARL BOPP, AND VICTOR POELS, CO-PARTNERS, DOING BUSINESS UNDER THE NAME OF PETRI & COMPANY, PLAINTIFFS IN ERROR,

*vs.*

THE F. E. CREELMAN LUMBER COMPANY AND FRANK E. CREELMAN.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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* * * * * * *

1–86 And on, to-wit, the 13th day of June, 1904, there was filed in the clerk's office of said court a certain certificate of a circuit judge that the only question involved is one of jurisdiction; which certificate is in words and figures following, to-wit:

Certificate That the Only Question Involved is One of Jurisdiction.

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss:

In the Circuit Court of the United States.

HAROLD PETRI, CARL BOPP, and VICTOR POELS, Co-partners, Doing Business under the Name of Petri & Company, Plaintiffs,

vs.

AMERICAN LUMBERMAN, a Corporation Organized and Doing Business under the Laws of the State of Illinois; James E. Defebaugh, William B. Judson, F. E. Creelman Lumber Company, a Corporation Organized and Doing Business under the Laws of the State of Illinois, and Frank E. Creelman, Defendants. } 25972.

Certificate of a Circuit Judge That the Only Question Involved in This Writ of Error is One of Jurisdiction.

Christian C. Kohlsaat, United States circuit judge of America, for the northern district of Illinois, northern division, hereby certifies, for the purpose of a writ of error in said cause, that he has examined the pleadings and record in said cause and that the only question involved in the writ of error in said cause is one of jurisdiction, which arises as follows:

Said Harold Petri, Carl Bopp and Victor Poels, co-partners
87 doing business under the name of Petri and Company, plaintiffs, each of whom are aliens residing in the city of Antwerp, Belgium, and are not citizens of the United States and are not residents or inhabitants of said northern district of Illinois, filed their præcipe for a summons on the 15th day of August, A. D. 1901, against American Lumberman, a corporation organized and doing business under the laws of the State of Illinois, James E. Defebaugh, William B. Judson, F. E. Creelman Lumber Company, a corporation organized and doing business under the laws of the State of Illinois, and Frank E. Creelman, defendants, which said defendants are all citizens of the United States residing in said State of Illinois,

in an action of trespass on the case in damages in the sum of fifty thousand dollars ($50,000.00).

A summons was issued on said August 15th, 1901, against said defendants in accordance with said præcipe and was served by the United States marshal of said northern district of Illinois, upon American Lumberman by reading the same to James E. Defebaugh, president of said corporation and delivering him a true copy thereof August 16, 1901, and served upon James E. Defebaugh personally, by reading the same to him within his presence and hearing August 16, 1901, and on said William B. Judson personally, by reading the same to him within his presence and hearing August 28, 1901; and on said August 16, 1901, there issued in said cause a summons directed to the marshal of the southern district of Illinois to execute; the summons was personally served upon Frank E. Creelman by reading the same to him on September 2, 1901, and the F. E. Creelman Lumber Company by reading and delivering a true
88 copy of said summons to F. E. Creelman, president of said company, at Cairo, Illinois, on September 2, 1901.

And said plaintiffs filed a declaration in said cause August 25, 1901, to which declaration The F. E. Creelman Lumber Company, a corporation, defendant, on March 7, 1902, filed a verified plea to the jurisdiction of said court alleging that said corporation was duly organized and doing business under and by virtue of the laws of the State of Illinois, having its chief and only office and place of business in the city of Cairo, in the county of Alexander in the southern district of the State of Illinois; and avers that before and at the time of the commencement of said action by said plaintiffs against the said defendants, it, the said F. E. Creelman Lumber Company was, and from thence hitherto has continuously been and still is, an inhabitant of the southern district of the State of Illinois and not of the northern district of Illinois; that plaintiffs are aliens and residents and inhabitants of Antwerp, Belgium, and not citizens of the United States nor inhabitants of the northern district of Illinois.

And the court certifies that on the 7th day of March, 1902, Frank E. Creelman, defendant, filed his verified plea to the jurisdiction of said court alleging that the plaintiffs were aliens and residents and inhabitants of Antwerp, Belgium, and not citizens of the United States nor inhabitants of the northern district of Illinois, and that said defendant, before and at the time of the commencement of said action, and from thence hitherto has continuously been and still is, a citizen of the State Illinois and a resident and inhabitant of the county of Alexander in the southern district of Illinois.

89 And the court certifies that to said pleas plaintiffs filed demurrers, on April 17, 1903; and the court certifies that said pleas coming on for hearing June 16, A. D. 1903, before his honor, J. O. Humphrey, after hearing arguments of counsel for the respective parties, on said demurrers to said pleas, the court sustained said pleas and overruled said demurrers and dismissed said suit as

to said defendants for want of jurisdiction; to all of which plaintiffs then and there duly excepted and duly filed their bill of exceptions August 13, 1903; and the court certifies that said plaintiffs insist that errors were committed to their prejudice which errors all relate to the question of the jurisdiction of said court under the facts heretofore certified.

And I further certify that the facts hereinbefore stated constitute all the errors complained of by said plaintiffs and that it is a full statement of the facts which appear of record in said cause concerning the sustaining of said pleas, as to the jurisdiction of said defendants.

I further certify that H. O. Humphrey, the judge who heard said cause, resides at Springfield, Illinois, in said southern district of Illinois, and is now out of the territorial limits of said northern district of Illinois.

I further certify that the only question of error involved in said record is one of jurisdiction of said circuit court, which is stated in this certificate, and said writ of error should go directly to the Supreme Court of the United States for adjudication.

Witness my hand and seal, this 14th day of June, A. D. 1904, at the December term, 1903, of said court.

KOHLSAAT, [SEAL.]
Judge of the Circuit Court for the
Northern District of Illinois.

(Endorsed:) Filed June 13, 1904. Marshall E. Sampsell, clerk.

90 And on to-wit: the 13th day of June, 1904, came the plaintiffs in said entitled cause by their attorney and filed in the clerk's office of said court a certain petition for writ of error in words and figures following to-wit:

91 Petition for Writ of Error.

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss:

In the Circuit Court of the United States.

HAROLD PETRI, CARL BOPP, and VICTOR POELS, Co-partners, Doing Business under the Name of Petri and Company, Plaintiffs,

vs.

AMERICAN LUMBERMAN, a Corporation Organized and Doing Business under the Laws of the State of Illinois; James E. Defebaugh, William B. Judson, F. E. Creelman Lumber Company, a Corporation Organized and Doing Business under the Laws of the State of Illinois, and Frank E. Creelman, Defendants. } 25972.

Petition for Writ of Error to the United States Supreme Court.

And now come Harold Petri, Carl Bopp and Victor Poels, each of whom are aliens residing in the city of Antwerp, Belgium, co-partners doing business under the name of Petri & Company, plaintiffs herein, and say that they filed a præcipe for a summons on the 15th day of August, A. D. 1901, against American Lumberman, a corporation organized and doing business under the laws of the State of Illinois, James E. Defebaugh, William B. Judson, F. E. Creelman Lumber Company, a corporation organized and doing business under the laws of the State of Illinois, and Frank E.
92 Creelman, defendants, which said defendants are all citizens of the United States residing in said State of Illinois, in an action of trespass on the case, in damages of the sum of fifty thousand dollars ($50,000).

A summons was issued on said last mentioned date returnable to the October term of said court, 1901, and was returned by the marshal of said northern district of Illinois, served upon the American Lumberman, by reading the same to James E. Defebaugh, president of said corporation, and delivering him a true copy thereof, August 16, 1901, and served upon James E. Defebaugh personally by reading the same to him and within his presence and hearing, August 16, 1901, and also served upon William B. Judson personally, by reading the same to him and within his presence and hearing, August 28, 1901; and on said August 16, 1901, there issued in said cause a summons directed to the marshal of the southern district of Illinois to execute, which summons was personally served upon said Frank E. Creelman by reading the same to him at Cairo, Illinois, on September 2, 1901 and on F. E. Creelman Lumber Company by reading and delivering a true copy of said summons to F. E. Creelman, president of said company, at Cairo, Illinois, on September 2, 1901.

And said plaintiffs say that they filed a declaration in said cause on August 25, 1901, to which declaration said F. E. Creelman Lumber Company, a corporation, defendant, on March 7, 1902, filed a verified plea to the jurisdiction of said court alleging that said corporation was duly organized and doing business under and by virtue of
93 the laws of the State of Illinois, having its chief and only office and place of business in the city of Cairo, in the county of Alexander in the southern district of the State of Illinois; and avers that before and at the time of the commencement of said action by said plaintiffs against the said defendants, it, the said F. E. Creelman Lumber Company was, and from thence hitherto has continuously been and still is, an inhabitant and resident of the southern district of the State of Illinois and not of the northern district of Illinois; that plaintiffs are aliens and residents and inhabitants of Antwerp, Belgium, and not citizens of the United States nor inhabitants of the northern district of Illinois.

And said Frank E. Creelman, defendant, filed his verified plea March 7, 1902, to the jurisdiction of said court alleging that the plaintiffs were aliens and residents and inhabitants of Antwerp, Belgium, and not citizens of the United States nor inhabitants of the northern district of Illinois, and that said defendant, before and at the time of the commencement of said action, and from thence hitherto has continuously been and still is, a citizen of the State of Illinois and a resident and inhabitant of the county of Alexander in the southern district of Illinois, and not of the northern district of Illinois.

To which pleas plaintiffs filed demurrers on April 17, 1903; and said pleas coming on for hearing June 16, A. D. 1903, one of the days of the December term 1902 of said court after hearing arguments of counsel for the respective parties on said demurrers to said pleas, the court sustained said pleas and overruled said demurrers and dismissed said suit as to said defendants for want of jurisdiction. To all of which plaintiffs then and there duly excepted and duly filed their bill of exceptions August 13, 1903, in which pro-
94 ceedings and judgment certain errors were committed to the prejudice of these plaintiffs, all of which will in detail appear from the assignment of errors which is filed with this petition.

Wherefore, these plaintiffs pray that a writ of error may issue in their behalf to carry said cause to the United States Supreme Court for the correction of the errors so complained of and that a transcript of the record, proceedings and papers in this cause, and a certificate that the only question involved is one of jurisdiction, duly authenticated, should be sent to said United States Supreme Court.

Dated this 9th day of June, A. D. 1904.

CONSIDER H. WILLETT,
SIDNEY S. GORHAM,
ALEXANDER W. CHAMBLISS,
SAMUEL M. CHAMBLISS,
Attorneys for Plaintiff.

(Endorsed:) Filed June 13 1904. Marshall E. Sampsell, clerk.

And on the same day, to-wit, the 13th day of June, 1904, came the plaintiffs in said entitled cause, by their attorney, and filed in the clerk's office of said court their certain assignment of error in words and figures following, to-wit:

95 Assignment of Errors.

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss:

In the Circuit Court of the United States.

HAROLD PETRI, CARL BOPP, and VICTOR POELS, Co-partners, Doing Business under the Name of Petri and Company, Plaintiffs,

vs.

AMERICAN LUMBERMAN, a Corporation Organized and Doing Business under the Laws of the State of Illinois; James E. Defebaugh, William B. Judson, F. E. Creelman Lumber Company, a Corporation Organized and Doing Business under the Laws of the State of Illinois, and Frank E. Creelman, Defendants. } 25972.

Afterwards, to-wit, in the year of our Lord one thousand, nine hundred and four, at the October term, A. D. 1904, of the United States Supreme Court,

Come said plaintiffs, Harold Petri, Carl Bopp and Victor Poels, co-partners doing business under the name of Petri and Company, by Consider H. Willett and Sidney S. Gorham, their attorneys, and say that in the record and proceedings in the above entitled cause and in the rendition of final judgment in said cause in behalf of F. E. Creelman Lumber Company, a corporation, and Frank E. Ceeelman, defendants, by dismissing this cause for want of jurisdiction as to said defendants, there is manifest error in the following, among other things, to-wit:

96–102 1. The court erred in not sustaining the demurrers of the plaintiffs to the pleas to the jurisdiction by said defendants, Frank E. Creelman and The F. E. Creelman Lumber Company, a corporation.

2. The court erred in overruling the demurrers of the plaintiffs to the pleas to the jurisdiction by said defendants, Frank E. Creelman and F. E. Creelman Lumber Company, a corporation.

3. The court erred in not sustaining said demurrers and ordering said defendants to plead, answer or demur to the declaration herein.

4. The court erred in dismissing suit as to said defendants,

Frank E. Creelman and The F. E. Creelman Lumber Company, a corporation.

5. The court erred in holding that it did not have jurisdiction of said defendants, Frank E. Creelman and The F. E. Creelman Lumber Company, a corporation, and in dismissing said suit as to said defendants, on their said pleas to the jurisdiction.

Wherefore, the said plaintiffs pray that for the errors aforesaid the said judgment of the said circuit court of the United States for the northern district of Illinois, northern division, be reversed; that this cause be remanded with the directions that said errors may be corrected; that said defendants, The F. E. Creelman Lumber Company, a corporation, and Frank E. Creelman, may, by the order of said court, be required to plead, answer or demur to the declaration of the plaintiffs herein and that the said plaintiffs may recover their costs on this appeal and other proceedings had to the end that justice may be done in the premises.

CONSIDER H. WILLETT,
SIDNEY S. GORHAM,
ALEXANDER W. CHAMBLISS,
SAMUEL M. CHAMBLISS,
Attorneys for Plaintiffs and Plaintiffs in Error.

(Endorsed:) Filed June 13, 1904. Marshall E. Sampsell, clerk.

* * * * * * *

103 UNITED STATES OF AMERICA:

In the Supreme Court, to the October Term, A. D. 1904.

HAROLD PETRI, CARL BOPP, and VICTOR POELS, Co-partners, Doing Business under the Name of Petri & Company, Plaintiffs in Error,
vs.
F. E. CREELMAN LUMBER COMPANY, a Corporation Organized and Doing Business under the Laws of the State of Illinois, and Frank E. Creelman (Impleaded with American Lumberman, a Corporation Organized and Doing Business under the Laws of the State of Illinois; James E. Defebaugh, and William B. Judson), Defendants in Error. } Gen. No. 298.

Statement of Plaintiffs in Error of Errors on Which They Intend to Rely and of the Parts of the Record Which They Think Necessary for the Consideration Thereof.

The plaintiffs in error will rely upon the following errors, assigned as a part of their petition for a writ of error herein.

The court erred in not sustaining the demurrers of the plaintiffs in error to the pleas to the jurisdiction by said defendants in error

F. E. Creelman Lumber Company, a corporation, and Frank E. Creelman; and

The court erred in holding that it did not have jurisdiction of said defendants in error, F. E. Creelman Lumber Company, a corporation, and Frank E. Creelman, and in dismissing said suits as to said defendants in error on their said pleas to the jurisdiction.

104 Said plaintiffs in error say that for the consideration of such question of jurisdiction the only parts of said record which are necessary for the consideration of the court are the petition for writ of error and its assignment of error and the certificate of the circuit judge that the only question involved is one of jurisdiction.

CONSIDER H. WILLETT,
Attorney for Plaintiffs in Error.

105 UNITED STATES OF AMERICA:

In the United States Supreme Court, to the October Term, A. D. 1904.

HAROLD PETRI, CARL BOPP, and VICTOR POELS, Co-partners, Doing Business under the Name of Petri & Company, Plaintiffs in Error,
vs.
F. E. CREELMAN LUMBER COMPANY, a Corporation Organized and Doing Business under the Laws of the State of Illinois, and Frank E. Creelman (Impleaded with American Lumberman, a Corporation Organized and Doing Business under the Laws of the State of Illinois; James E. Defebaugh, and William B. Judson), Defendants in Error. } Gen. No. 298.

To Lansden & Leek, David S. Lansden, and Mason & Noyes, attorneys in the circuit court for defendants in error:

Please take notice that on the 9th day of September, A. D. 1904, we shall file with the clerk of the Supreme Court of the United States the annexed statement of errors upon which the plaintiffs in error intend to rely and also such parts of the record as said plaintiffs in error think necessary for the consideration thereof, in accordance with rule 10, clause 9 of the Supreme Court of the United States.

Yours,
CONSIDER H. WILLETT,
Attorney for Plaintiffs in Error.

Received a copy of the above notice, together with a copy of the statement of errors on which plaintiffs in error intend to rely and a statement of the parts of the record which plaintiffs in error think

necessary for the consideration thereof, this 7th day of September, A. D. 1904.

LANSDEN & LEEK,
DAVID S. LANSDEN,
MASON & NOYES,
Attorneys for Defendants in Error.

106 [Endorsed:] File No. 19,398. Supreme Court U. S., October term, 1904. Term No. 298. Harold Petri *et al.*, pl'ffs in error, *vs.* F. E. Creelman Lumber Co. *et al.* Statement of errors and designation by pl'ff- in error of parts of record to be printed. Filed Sept. 9, 1904.

Endorsed on cover: File No. 19,398. N. Illinois C. C. U. S. Term No. 298. Harold Petri, Carl Bopp, & Victor Poels, copartners, doing business under the name of Petri & Company, plaintiffs in error, *vs.* The F. E. Creelman Lumber Company and Frank E. Creelman. Filed June 17, 1904. File No. 19,398.

FILED
FEB 27 1905
JAMES H. McKENNEY,
Clerk.

ADDITIONAL TRANSCRIPT OF RECORD.
(By leave of Court.)

# Supreme Court of the United States

OCTOBER TERM, 1904.

No. 49.

HAROLD PETRI, CARL BOPP AND VICTOR POELS, Co-partners, doing business under the name of Petri & Company, Plaintiffs in Error,

*vs.*

THE F. E. CREELMAN LUMBER COMPANY AND FRANK E. CREELMAN.

In error to the Circuit Court of the United States for The Northern Division of the Northern District of Illinois.

FILED JUNE 17, 1904.

(19,398.)

(19,398.)

# Supreme Court of the United States

OCTOBER TERM, 1904.

No. 298.

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**HAROLD PETRI, CARL BOPP AND VICTOR POELS, Co-partners, doing business under the name of Petri & Company, Plaintiffs in Error,**

*vs.*

**THE F. E. CREELMAN LUMBER COMPANY AND FRANK E. CREELMAN.**

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**In error to the Circuit Court of the United States for The Northern Division of the Northern District of Illinois.**

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## JUDGMENT ORDER OF JUNE 16, 1903,

**Dismissing Suit as to Frank E. Creelman and F. E. Creelman Lumber Company for want of jurisdiction.**

| | |
|---|---|
| Harold Petri, Carl Bopp and Victor Poels, co-partners, doing business under the name of Petri & Company. | |
| *vs.* | |
| Frank E. Creelman, American Lumberman, a corporation, James E. Defebaugh, William B. Judson and F. E. Creelman Lumber Company, a corporation. | 25972. |

Now come the parties by their attorneys, and the demurrers of the plaintiffs to the pleas of jurisdiction, filed by the defendents, Frank F. Creelman and F. E. Creelman Lumber Company, are heard and overruled; the plaintiffs excepting thereto, elect to stand by their demurrers, and the Court finding said pleas sufficient,

It is thereupon Ordered that this cause be and the same is hereby dismissed as to said defendants, Frank E. Creelman and F. E. Creelman Lumber Company at the costs of the plaintiffs, taxed at the sum of dollars and cents and that execution issue therefor. Whereupon the plaintiffs enter their motion for a writ of error to the United States Circuit Court of Appeals for this Circuit. The penalty of the bond on said writ of error is fixed at the sum of five hundred dollars to be filed in sixty days, together with their bill of exceptions.

## BILL OF EXCEPTIONS FILED AUGUST 13, 1903.

United States of America,
State of Illinois, } ss.
County of Cook.

## IN THE CIRCUIT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION.

Harold Petri, Carl Bopp and Victor Poels, co-partners doing business under the name of Petri & Company,

*vs.*

F. E. Creelman Lumber Company, a corporation, Frank E. Creelman, American Lumberman, a corporation, James E. Defebaugh and Willlam B. Judson.

Be it remembered that heretofore, to-wit, on the 16th day of June, A. D 1903, this cause coming on to be heard on the declaration filed herein, the pleas of Frank E. Creelman and F. E. Creelman Lumber Company, a corporation, and the demurrer of plaintiffs to said pleas to the jurisdiction, on motion of counsel for said defendants, the Court having heard the arguments of counsel for said defendants, and counsel for plaintiffs, and being fully advised in the premises, the following order was had and entered of record:

Now come the parties, by their Attorneys, and the demurrers of the plaintiffs to the pleas of jurisdiction filed by the

defendants, Frank E. Creelman and F. E. Creelman Lumber Company, are heard and over-ruled. The plaintiffs, excepting thereto, elect to stand by their demurrers, and the court finding said pleas sufficient,

It is thereupon Ordered that this cause be, and the same is hereby dismissed as to said defendants, Frank E. Creelman and F. E. Creelman Lumber Company, at the costs of the plaintiffs, taxed at the sum of dollars and cents, and that execution issue therefor.

To which order of the court plaintiffs then and there excepted.

Whereupon, the plaintiffs enter their motion for a writ of error to the United States Circuit Court of Appeals for this Circuit. The penalty of the bond on said writ of error is fixed at the sum of Five-hundred dollars, to be filed in sixty days, together with their bill of exceptions.

And because the matters and things aforesaid do not fully appear of record, the plaintiffs present this, their bill of exceptions, and pray that the same may be signed and sealed by the Judge of this Court, pursuant to the statute in such case made and provided, which is accordingly done, this 12th day of Aug., A. D. 1903.

Kohlsaat,

J.

O. K.

DAVID S. LANSDEN,
LANSDEN & LEEK,
M. PAUL NOYES,
Attorneys for Defendants,
Frank E. Creelman and
F. E. Creelman Lumber Company.

(Endorsed) Filed Aug. 13, 1903, Marshall E. Sampsell, Clerk.

FILE COPY.

FILED
FEB 27 1905
JAMES H. MCKENNEY,
Clerk.

# Supreme Court of the United States

OCTOBER TERM, 1904.

No. 208 (10,396)

HAROLD PETRI, CARL ROPP AND VICTOR POELS, Co-partners, doing business under the name of Petri & Company, Plaintiffs in Error,

vs.

THE F. E. CRESELMAN LUMBER COMPANY AND FRANK E. CRESELMAN, Defendants in Error.

In Error to the Circuit Court of the United States for The Northern Division of the Northern District of Illinois.

## MOTION TO DISMISS WRIT OF ERROR.

Answer and Brief of Plaintiffs in Error to motion to dismiss writ of error.

CONSALUS H. WILLETT,
Attorney for Plaintiffs in Error.

# Supreme Court of the United States

OCTOBER TERM, 1904.

No. 298. (19,398)

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HAROLD PETRI, CARL BOPP AND VICTOR POELS, Co-partners, doing business under the name of Petri & Company, Plaintiffs in Error,

vs.

THE F. E. CREELMAN LUMBER COMPANY AND FRANK E. CREELMAN, Defendants in Error.

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**In Error to the Circuit Court of the United States for The Northern Division of the Northern District of Illinois.**

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## MOTION TO DISMISS WRIT OF ERROR.

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Answer and Brief of Plaintiffs in Error to motion to dismiss writ of error.

*Statement.*

We shall assume in this argument to oppose the motion for a dismissal of the writ of error that the court permits the additional transcript of the record to be printed and filed. Such parts of the record so printed are accurately stated in the certificate of the court that the only question involved is one of jurisdiction. Such additional printing makes clear that the judgment order shows that it was determined on the sole question of the want of jurisdiction; and that the bill of exceptions was filed in apt time showing that the only question invovled was one of jurisdiction. The record shows (in accordance with the certificate) that the plaintiffs in error who were plaintiffs below are aliens, being citizens of Antwerp, Belgium, who brought suit in the Northern Division of the Northern District of Illinois, August 15, 1901, against defendants, citizens, residents and inhabitants therein and against defendants in error, citizens, residents and inhabitants of the Southern District of Illinois. Pleas of the defendants in error of March 7, 1902, that they could be sued only in their home, the Southern District of Illinois, though they were jointly liable with defendants who were sued with them and were residents of the Northern District of Illinois, Northern Division, were sustained June 16, 1903. The sole question is one of jurisdiction, whether we gather it from the record or confine ourselves to the certificate that the only question involved in this writ of error is one of jurisdiction.

The question seeking solution is an old one, passed upon differently by different circuit courts, but has never been passed upon by this court.

To give two years to prosecute a writ of error upon a question of jurisdiction must mean that application for such writ of

error may be made at any time within such two years, which being granted, the court granting the writ of error must certify that the only question involved is one of jurisdiction and at the same time fixing the amount of the bond and approving it.

Where it appears, from the record, as in this case, that the only question involved in the record is one of jurisdiction, no bill of exceptions is necessary to show such fact, which already appears of record as fully as a bill of exceptions could show it. Where a question of jurisdiction does not appear from the record is where the evidence discloses the amount in controversy to be too small or evidence is taken to show citizenship, the bill of exceptions is essential; but when the record shows upon its face that the controversy was disposed of because the court had no jurisdiction, a bill of exceptions could add nothing to such record. To save labor to the Supreme Court it is manifestly a proper rule of practice, as designated by the statute, for the trial court having charge of the record in question to certify that the only question involved in the writ of error is one of jurisdiction at the time that the writ of error is allowed, which, as we contend, is at any time within two years from the entry of judgment.

*Points and Authorities.*

1

The record showing that the only question involved is one of jurisdiction, such record takes the place of a bill of exceptions showing that the only question embraced in the record is one of jurisdiction.

Excelsior W. P. Co. vs. Pacific Bridge Co., 185 U.S., 282;

Huntington vs. Laidley, 176 U. S., 668;

Smith vs. McKay, 161 U. S., 355;
Campbell vs. U. S., 160 U. S., 499;
Van Wagenen vs. Sewall, 160 U. S. 369, 372;
Interior Construction Co. vs. Gibney, 160 U. S. 217;
Shields vs. Coleman, 157 U. S., 168;
*In re* Lehigh Company, 156 U. S., 322.

2

The right to a writ of error from a Circuit Court to the United States Supreme Court where suit is dismissed on the sole ground of a want of jurisdiction, is for two years.

Excelsior W. P. Co. vs. Pacific Bridge Co., 185 U. S., 282-285;
Allen vs. Southern Pacific R. R., 173 U. S., 479;
Holt vs. Ind. Mnfg. Co., 176 U. S., 68.

As a part of such writ of error and in compliance with 1 U. S. Compiled Laws, page 549, section 5; Act of Congress of March 3, 1891, 26 Statutes at Large, page 826; where a writ of error is sued out, the court having jurisdiction, the court whose clerk has charge of the record at the time of making application for the writ of error, must certify that the only question involved in the writ of error is one of jurisdiction and at the same time the same judge requires a bond of plaintiffs in error.

Excelsior W. P. Co. vs. Pacific Bridge Co., 185 U. S., 282.
Huntington vs. Laidley, 176 U. S., 668.

3

A bill of exceptions is only essential when facts *dehors* the record are to be preserved. Where the record itself shows that the plaintiffs lose their suit upon pleas to the jurisdiction because the defendants in error are not properly served with

summons within the judicial district where suit is brought, such facts appear of record and require no bill of exceptions to preserve them. In such case a certificate that the only question involved in a writ of error from such judgment is one of jurisdiction, is mere recital of facts existing of record to save labor to the Supreme Court and puts no new facts into the record.

Interior Construction Co. vs Gibney, 160 U. S., 499.

4

The judgment order of June 16, 1903, sustaining pleas of defendants in error to the jurisdiction of the Court on the specific ground that the Circuit Court of the Northern District of Illinois, though suit was well brought in said Northern District as to certain other joint defendants who were citizens and residents of said District, could not send its summons to the Southern District of Illinois and service upon defendants in error in said Southern District was beyond the jurisdiction of the Court, takes the place of a certificate that the only question involved was one of jurisdiction.

In such case no bill of exceptions is necessary to merely repeat what is already preserved in the record.

5

Although generally a bill of exceptions must be signed by the trial judge and filed during the term of court at which the trial occurred, or such further time as may be granted at the trial term, such practice has no application to the granting of a certificate that the only question involved is one of jurisdiction, which appears from an inspection of the record.

6

The single question seeking solution is whether a certificate that the only question involved in the writ of error is one of

jurisdiction, can be made at any time within the time permitted for taking a writ of error, or whether it must be made at the term of court at which the judgment is rendered.

7

This motion should be reserved for a hearing on the merits to save labor to this court.

## ARGUMENT.

1

We urge that the record showing that the only question is one of jurisdiction takes the place of a bill of exceptions, in which case the judge granting a writ of error should sign the certificate that the only question involved is one of jurisdiction at any time within two years allowed to sue out such writ of error, and at the time of granting such writ of error.

In Interior Construction Company vs. Gibney, 160 U. S., 217, on page 219, Justice Gray says:

"The record shows that the only matter tried and decided in the Circuit Court was a demurrer to the plea of jurisdiction; and a petition upon which the writ of error was allowed asked only for the review of the judgment that the court had no jurisdiction of the action. The question of jurisdiction alone was thus sufficiently certified to this court as required by the act of March 3, 1891, chapter 517, section 5, 26 Stat. 828."

This case is indentical with the one at bar.

In Excelsior W. P. Co. vs. Pacific Bridge Company, 185 U. S., 282, on page 284, Justice Brown says:

"Motion is made by defendants to dismiss this appeal upon the ground that no appeal is taken, and no certificate of the trial court upon the question of jurisdiction was made by such

court during the term at which the decree was rendered, and that no such certificate has since, or ever been, made.

"As the appeal was taken directly to this Court it must appear under the fifth section of the Court of Appeals Act, either that the question of jurisdiction was certified to this Court or that the decree appealed from shows upon its face that the sole question decided was one of jurisdiction. Plaintiff evidently supposed that the case was a proper one to carry to the Court of Appeals, but its appeal having been there dismissed it took this appeal May 27, 1901, from the original decree of the Circuit Court made November 5, 1900. This decree, after reciting 'that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this Court, and that this Court should not further exercise jurisdiction, it is therefore Ordered, and decreed that said suit be, and the same is hereby, dismissed for want of jurisdiction.' An appeal was taken from this decree, and the order allowing the appeal states that the appeal was allowed 'from the final order and decree dismissing said suit for want of jurisdiction.' This is clearly a sufficient certificate of the Circuit Court that the jurisdiction of that Court was in issue, and the only question to be considered by us relates to the jurisdiction of that Court."

(Citing Shields vs. Coleman, 157 U. S., 168; *in re* Lehigh Mining Co., 156 U. S., 322; Huntington vs. Laidley, 176 U. S., 668.)

"The case being thus in proper condition for appeal, such appeal could be taken at any time within two years."

(Citing Allen vs. Southern Pacific R. R., 173 U. S., 479; Holt vs. Ind. Manfg. Co., 176 U. S., 68.)

In the fact of going to the Appellate Court instead of the Supreme Court this case is identical with the record in this case.

In Huntington vs. Laidley, 176 U. S., 668, the second head note reads:

"A certificate of a question of jurisdiction of the Circuit Court of the United States under the act of March 3, 1891, chapter 517, section 5, may be made by the District Court even if the decree was rendered by the Circuit Court."

In that case it appears a motion was made to dismiss the appeal upon the ground "that the district judge could not certify a question decided by the circuit judge or allow an appeal from his decree."

Justice Gray said, page 676:

"In order to maintain the appellate jurisdiction of this Court the record must distinctly and unequivocally show that the Court below sends up for consideration a single and definite question of jurisdiction. This may appear in either of two ways; by the terms of the decree appealed from and the order allowing the appeal; or by separate certificate of the court below." (Citing cases.)

The Court entertained jurisdiction upon a certificate as to jurisdiction of another judge than the trial judge.

In Chappell vs. United States, 160 U. S., 499, Justice Gray, on page 507, said:

"In order to bring the case within the first class (questions of jurisdiction) not only must it appear of record that a question of jurisdiction was involved in the decision below, but that question, and that alone, must be certified to this Court. If both a question of jurisdiction and other questions were before the Court below, and a writ of error is allowed in the usual and general form, to review its judgment, without certifying or specifying the question of jurisdiction, this Court cannot take jurisdiction under this clause of the statutes (cases cited). If, indeed, the writ of error is allowed upon the petition

of the original plaintiff, asking for a review of a judgment dismissing the action for want of jurisdiction, and the only question tried and decided in the Court below was a question of jurisdiction, that question is sufficiently certified to this Court. (Cases cited.) And if an appeal from a decree of the Circuit Court appointing a receiver is allowed by the Court, "solely upon the question of jurisdiction," and on a petition praying an appeal from the decree as "taking and exercising jurisdiction," the question of jurisdiction is sufficiently certified. (Citing Shields vs. Coleman, 157 U. S., 168.)

But in the case just cited, Shields vs. Coleman, the essential requisite that the appellate jurisdiction of this Court in this class of cases was defined as follows: "It is not necessary that the word 'certified' be formally used. It is sufficient if there is a plain declaration that the only matter which is by the record sent up to this Court for decision is a question of jurisdiction and the precise question clearly, fully and particularly stated.

No mere suggestion that the only question is one of jurisdiction will answer. The Court will not itself search, nor follow counsel in their search of the records to ascertain whether the judgment of the trial court did or did not turn on some question of jurisdiction. But the record must affirmatively show that the trial court sends up for consideration a single definite question of jurisdiction."

In Smith vs. McKay, 161 U. S., 355, Justice Shiras, on page 356, said:

"It is contended on the part of the appellee that we should dismiss this appeal because the question of jurisdiction is not properly certified to this Court. The record discloses that defendants below appealed upon the express ground that the Court erred in taking jurisdiction of the bill and in not dis-

missing the bill for want of jurisdiction, and prays that their appeal should be allowed and the question of jurisdiction be certified to the Supreme Court and that said appeal was allowed. The certificate further states that there is sent a true copy of so much of the record as is necessary for the determination of the question of jurisdiction, and as part of the record so certified is the opinion of the Court below, in accordance with which defendant's motion to dismiss for want of jurisdiction was denied. It, therefore, appears that the appeal was granted solely upon the question of jurisdiction."

The additional printing will make clear that the record shows upon its face that the only question involved is one of jurisdiction, so that such record takes the place of a certificate that the only question involved is one of jurisdiction. The record showing the question, no bill of exceptions is necessary for that purpose.

2

In 1 United States Compiled Statutes, page 549, will be found the statute which covers the case at bar, as follows:

"Sec. 5. That appeals or writs of error may be taken from the district courts or from existing circuit courts direct to the Supreme Court in the following cases; in any case in which the jurisdiction of the Court is in issue; in such case the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision." (Act of Congress approved March 3, 1891, 26 U. S. Statutes at Large, 826.)

The case being in proper condition for a writ of error, such writ of error may be taken at any time within two years from the rendition of the judgment denying jurisdiction.

Excelsior W. P. Co. vs. Pacific Bridge Co., 185 U. S., 282;

Allen vs. Southern Pacific R. R., 173 U. S., 479;
Holt vs. Ind. Mnfg. Co., 176 U. S., 18.

The only office of this particular bill of exceptions was to affirm the fact that the record spoke the truth in dismissing the defendants in error out of the case on their pleas that the Court had no jurisdiction and at the costs of the plaintiffs. The bill of exceptions could and did add nothing to the record.

The bill of exceptions, if good, makes a proper certificate that the only question involved was one of jurisdiction. It is true that this certificate permits a writ of error to the United States Court of Appeals when it ought to have been to the United States Supreme Court; but such mention of the Court of Appeals is surplusage and the United States statutes supply the proper court by force of law.

Excelsior W. P. Co. vs. Pacific Bridge Co., 185 U. S., 282.

3

The statutory requirement of a certificate that the only question involved is one of jurisdiction is manifestly one to save labor of the Supreme Court. It puts no new fact into the record but simplifies and abstracts the question of jurisdiction. A bill of exceptions, on the contrary, is to incorporate into the record facts which otherwise would be no part of the record.

A certificate that the only question in the record at issue is one of jurisdiction, may be made by another judge than the trial judge at any time within two years after final disposition of the case.

Huntington vs. Laidley, 176 U. S., 668.

In the case last cited, Justice Gray, on page 677, says:

"It does not appear from the record, and it is immaterial, whether the final decree was rendered by the Circuit judge or by the District judge. The District judge was a judge of the Circuit Court of the United States, and as such had authority to allow the appeal and to sign the citation, even if the decree was rendered by the Circuit judge. * * * We can have no doubt that the District judge, who as a judge of the Circuit Court lawfully allowed the appeal and signed the citation, had authority also to certify to this Court the question of jurisdiction determined by that decree.

"The question of jurisdiction then, appearing by the decree itself and by the order allowing the appeal therefrom, as well as by the distinct and contemporaneous certificate, to have been a question on which the decree below was based, is rightly before this Court for determination."

4

Where it appears as in this case that the only question involved in the record is one of jurisdiction set up by pleas to the jurisdiction which are sustained, no bill of exceptions is necessary to show such fact which already appears of record as fully as a bill of exceptions could show it.

Where the question of jurisdiction does not appear from the record, as where the evidence discloses the amount in controversy to be too small or evidence is taken to show citizenship, a bill of exceptions is essential.

But when the record itself shows that the controversy was disposed of because the court had no jurisdiction which is fully shown of record a bill of exceptions can add nothing to such record.

Interior Construction Co. vs. Gibney 160 U. S. 217.

By an act of June 5, 1900, found in 31 U. S. Statutes at Large, p. 270, provision was made for another than a trial judge to sign a bill of exceptions. Such statute reads as follows:

(U. S. Compiled Laws, Section 953).

"That a bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof if more than one judge sat at the trial of the cause, without any seal of the court or judge annexed thereto. And in case the judge before whom the cause has heretofore been or may hereafter be tried, is, by reason of death, sickness or other disability, unable to hear and pass upon the motion for a new trial and allow and sign said bill of exceptions, then the judge who succeeds such trial judge or any other judge of the court in which the cause was tried, holding such court thereafter, if the evidence in such cause has been or is taken in stenographic notes, or *if the said judge is satisfied by any other means that he can pass upon such motion and allow a true bill of exceptions*, shall pass upon said motion and allow and sign such bill of exceptions; and his ruling upon such motion and allowance and signing of such bill of exceptions shall be as valid as if such ruling and allowance and signing of such bill of exceptions had been made by the judge before whom such cause was tried; but in case said judge is satisfied that owing to the fact that he did not preside at the trial, or for any other cause, that he can not fairly pass upon said motion, and allow and sign said bill of exceptions, then he may, in his discretion, grant a new trial to the party moving therefor."

The bill of exceptions in the additional printed transcript of the record shows that it was "O. K."ed by the attorneys for the defendants in error. Such "O. K." was a waiver by

them of the signature of Judge Humphrey to the bill of exceptions and a consent to the signature of Judge Kohlsaat. If any fault existed to the allowance of the bill of exceptions it was the duty of the defendants in error to preserve their exceptions taken at the time the bill of exceptions became a part of the record, showing that the court had no authority to grant such bill of exceptions which should have been preserved by a proper bill of exceptions. No valid objection appearing of record to the bill of exceptions the presumption of law should prevail that the bill of exceptions was properly signed and became a part of the record of this cause.

The court entertained jurisdiction upon a certificate that the only question was one of jurisdiction which was made by another judge than the trial judges in

Chappell vs. U. S. 160 U. S. 499.

6

If, as we have endeavored to show, a record can take the place of a certificate of the circuit judge that the only question involved in the writ of error is one of jurisdiction, yet we apprehend the proper practice when a writ of error is sought and allowed requires the judge granting such writ of error to make the certificate that the only question involved in the issue is one of jurisdiction. If the evidence discloses that the court is lacking jurisdiction, such facts must of course be preserved by a bill of exceptions; in such case the bill of exceptions must be filed at the term of court in which the trial occurs or such further time as may be granted within such term. The bill of exceptions when necessary being properly filed, no reason is perceived why a writ of error may not be sued out as the statute permits, within two years. At

the mere fact the statutory requirement of a certificate that the only question is one of jurisdiction should become a part of the allowance of the writ of error. Where facts are to be preserved it is manifestly proper that the judge who tried the case should sign the bill of exceptions, but where the certificate is made for the benefit of this court to save labor of this court, from an inspection of the record by the trial court, no reason is perceived why any judge who has jurisdiction over the record may not make such a certificate.

If the Court should refuse leave to print and file an additional transcript of the record, it would in no way alter the principles which should govern this record, the record being a complete one. The plaintiffs in error under the rules of this Court in cases concerning jurisdiction have designated what parts of the record should be printed (transcript page 7); such record so designated and printed contains the certificate of the judge granting the writ of error and stating in detail the facts showing that the only question involved is one of jurisdiction. The statement in said certificate (see transcript, page 3) "that H. O. Humphrey, the judge who heard said cause, resides at Springfield, Illinois, in said Southern District of Illinois, and is now out of the territorial limits of said Northern District of Illinois," is mere surplusage and in no way impairs the force of such certificate as a certification under the statute that the only question involved is one of jurisdiction. It is not too much to ask that this certificate of jurisdiction alone should be considered upon this motion, when no counter notice was served upon plaintiffs in error that any further portions of the record should be printed showing the facts upon which the contentions to dismiss the writ of error should be based. If we confine ourselves to that certificate of jurisdiction it clearly appears that a bill of exceptions was properly filed preserving

the fact that no question was decided by the trial court except one of jurisdiction. The petition for the writ of error and the assignment of errors are confined solely to the question of jurisdiction. The fact that Judge H. O. Humphrey decided this case did not prevent Judge Christian C. Kohlsaat from hearing the petition for the writ of error and granting the same, and at the same time fixing and approving a bond and making the proper certificate that the only question involved was one of jurisdiction, so that the appeal should go directly from the Circuit Court to the United States Supreme Court.

It is discretionary with this Court to hear this motion by itself or when the merits of the cause are fully considered. We suggest that it would save the labor of this Court to continue this motion until the hearing upon the merits.

Respectfully submitted,

CONSIDER H. WILLETT,

*Attorney for Plaintiffs in Error.*

FILE COPY.

FILED
FEB 27 1905
JAMES H. McKENNEY,
Clerk.

MOTION TO PRINT ADDITIONAL PARTS OF THE RECORD.

# Supreme Court of the United States

OCTOBER TERM, 1904.

No. ~~198~~ 49 (19,398)

**HAROLD PETRI, CARL BOPP AND VICTOR POELS, Co-partners, doing business under the name of Petri & Company, Plaintiffs in Error,**

*vs.*

**THE F. E. CREELMAN LUMBER COMPANY AND FRANK E. CREELMAN, Defendants in Error.**

## Error to the Circuit Court of the United States for The Northern Division of the Northern District of Illinois.

Motion by the Plaintiffs in Error to print additional parts of the Record, to-wit: an order dismissing said cause for want of jurisdiction, and a Bill of Exceptions in answer to motion by Defendants in Error to dismiss writ of error.

CONSIDER H. WILLET,
Attorney for
Plaintiffs in Error.

# Supreme Court of the United States

OCTOBER TERM, 1904.

No. 298. (19,398)

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**HAROLD PETRI, CARL BOPP AND VICTOR POELS, Co-partners, doing business under the name of Petri & Company, Plaintiffs in Error,**

*vs.*

**F. E. CREELMAN LUMBER COMPANY AND FRANK E. CREELMAN, Defendants in Error.**

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## Error to the Circuit Court of the United States for The Northern Division of the Northern District of Illinois.

Motion by plaintiffs in error in answer to motion of defendants in error to dismiss writ of error, for leave to print the order dismissing said cause for want of jurisdiction, June 16, 1903, and found on page 82 of the Record, and the bill of exceptions filed in said cause August 13, 1903, and found on page 83 of the Record.

Now, at this time, to-wit, on the 27th day of February, 1905, come the plaintiffs in error by Considder H. Willett, their attorney, and move the Court for leave to print the order dismissing said cause for want of jurisdiction, June 16, 1903, and found on page 82 of the Record, and the bill of exceptions filed in said cause August 13, 1903, and found on page 83 of the Record, for the following reason, to-wit:

Because said final judgment dismissing said cause for want of jurisdiction and said bill of exceptions are essential to a full understanding of said cause, upon the motion of defendants in error to dismiss said writ of error for want of jurisdiction.

CONSIDER H. WILLETT,
Attorney for Plaintiffs in Error.

*Suggestions:*

The record is a complete one.

The plaintiffs in error, in accordance with the rules of this Court, designated what portion of the Record should be printed to present the merits of this controversy. No counter notice was served upon the plaintiffs in error by defendants in error for the printing of any additional record.

The only question involved is one of jurisdiction. Suit was brought August 15, 1901, in the Northern Division of the Northern District of Illinois by the plaintiffs in error, who are aliens residing at Antwerp, Belgium, against the American Lumberman, a corporation organized and doing business under the laws of the State of Illinois, James E. Defebaugh and William B. Judson, who are residents and citizens of said Northern Division of said Northern District, and to whom a summons was issued to the Marshal of said Northern District of Illinois, and said suit was also brought against said Defendants in error

who are residents and citizens of the Southern District of Illinois and to whom a summons was issued to the Marshal of the said Southern District of Illinois. On March 7th, 1902, the Defendants in error filed pleas that the court had no jurisdiction. Demurrers to said pleas were filed April 17th, 1903, which were over-ruled and said pleas sustained by said order of June 16th, 1903.

Now the motion to dismiss the writ of error because the certificate of the trial court showing that the only question involved is one of jurisdiction, was not made in apt time and by the proper judge makes it important that the final order of June 16th, 1903, dismissing said cause for want of jurisdiction and the bill of exceptions of August 13th, 1903, showing the same fact, should be printed, that said motion may be properly considered by this court.

The additional printing will make clear that the record shows upon its face that the only question involved is one of jurisdiction, so that such record takes the place of a certificate that the only question involved is one of jurisdiction. The record showing the question was only one of jurisdiction, no bill of exceptions is necessary for that purpose.

Interior Construction Company v. Gibney.
160 U. S. 217-219.
Van Wagenen v. Sewall.
160 U. S. 369-372.

The question of jurisdiction is whether or not, where defendants are citizens and residents of different judicial districts of the same State, suit may be brought in either district.

Respectfully submitted,

CONSIDER H. WILLETT,
Attorney for Plaintiffs in Error.

FILE COPY.

Office Supreme Court U. S.
FILED
APR 15 1905
JAMES H. McKENNEY,
Clerk.

# Supreme Court of the United States

OCTOBER TERM, 1904.

No. ~~298~~ 49 (19,398)

HAROLD PETRI, CARL BOPP AND VICTOR POELS, Co-partners, doing business under the name of Petri & Company, Plaintiffs in Error,

vs.

THE F. E. CREELMAN LUMBER COMPANY AND FRANK E. CREELMAN, Defendants in Error.

**In Error to the Circuit Court of the United States for The Northern Division of the Northern District of Illinois.**

Brief and Argument of Plaintiffs in Error.
(On the Merits.)

CONSIDER H. WILLETT,
Attorney for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1904.

No. 298 (19,398).

Harold Petri, Carl Bopp and Victor Poels, co-partners, doing business under the name of Petri & Company, Plaintiffs in Error,

vs.

The F. E. Creelman Lumber Company and Frank E. Creelman, Defendants in Error.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Brief and Argument of Plaintiffs in Error.
(On the Merits.)

STATEMENT.

The record involves but the single question of jurisdiction. The Plaintiffs in error, who were plaintiffs below, are aliens residing in the City of Antwerp, Belgium. They filed their præcipe for a summons August 15, 1901, against the American Lumberman, a corporation organized and doing business under the laws of the State of Illinois, James E. Defebaugh, William B. Judson, F. E. Creelman Lumber Company, a corporation organized and doing business under the laws of the State of Illinois, and Frank E. Creelman. defendants, which said defendants are all citizens of the United States residing in the State of Illinois (transcript of record, page 1) in an action of trespass on the case in damages in the sum of fifty thousand dollars. A summons was issued August 15, 1901, against said defendants in accordance with said præcipe and was served by the United States Marshal of said Northern District of Illinois upon the American Lumberman by reading the same to James E. Defebaugh, president of said cor-

poration and delivering him a true copy thereof August 16, 1901, and served upon James E. Defebaugh personally by reading same to him within his presence and hearing August 16, 1901, and on said William B. Judson personally by reading the same to him within his presence and hearing August 28, 1901; and on August 16, 1901, there issued in said cause a duplicate summons directed to the Marshal of the Southern District of Illinois to execute; which summons was personally served upon Frank E. Creelman by reading the same to him on September 2, 1901, and the F. E. Creelman Lumber Company by reading and delivering a true copy of said summons to F. E. Creelman, president of said company, at Cairo, Illinois on September 2, 1901. Plaintiffs filed a declaration in said cause August 25, 1901, to which declaration the F. E. Creelman Lumber Company, a corporation, defendant, on March 7, 1902, filed a verified plea to the jurisdiction of said court alleging that said corporation was duly organized and doing business under and by virtue of the laws of the State of Illinois, having its chief and only office and place of business in the city of Cairo in the County of Alexander in the Southern District of the State of Illinois and aver that before and at the time of the commencement of said action by said plaintiffs against the said defendants, it, the said F. E. Creelman Lumber Company was, and from thence hitherto has continuously been and still is, an inhabitant of the Southern District of the State of Illinois and not of the Northern District of Illinois; that plaintiffs are alieus and residents and inhabitants of Antwerp, Belgium, and not citizens of the United States nor inhabitants of the Northern District of Illinois. On March 7, 1902, Frank E. Creelman, defendant, filed his verified plea to the jurisdiction of said court alleging that plaintiffs were aliens and residents and inhabitants of Antwerp, Belgium, and not citizens of the United States nor inhabitants of the Northern District of Illinois, and that said defendant, before and at the time of the commencement of said action and from thence hitherto has continuously been and still is a citizen

of the State of Illinois and a resident and inhabitant of the County of Alexander in the Southern District of Illinois. The plaintiffs filed demurrers to said pleas April 17, 1903. The Court, Judge H. O. Humphrey, sustained said pleas and over-ruled said demurrers and dismissed said suit (transcript of record, page 2) as to said defendants for want of jurisdiction, June 16, 1903.

The question presented for consideration is whether, in a civil suit not of a local nature, which is properly brought in the Circuit court in a state which contains more than one judicial district, can a duplicate summons issue against other defendants who are citizens of the same state and residents of the other judicial district. It was the contention of the defendants in error that since they were inhabitants and residents of the Souhern District of Illinois, they could not be sued in the Northern District thereof, even though they were joined with others who were residents and inhabitants of said Northern District and over whom the court had jurisdiction by actual service of summons on them in the division of their residence and in the district in which the suit was brought.

## *ERRORS RELIED UPON.*

The Court erred in holding that it did not have jurisdiction of the defendants in error and in sustaining their pleas that the Court had no jurisdiction. (Transcript of record, page 6).

Plaintiffs being aliens, having a cause of action against defendants, who were citizens of Illinois some of whom resided in the Northern Division of the Northern District of Illinois where suit was brought the Court erred in holding that a duplicate summons could not issue to defendants residents of the Southern District of Illinois.

## *POINTS AND AUTHORITIES.*

### *I.*

The single question presented is whether or not the Court had jurisdiction.

Plaintiffs being aliens, having a cause of action against

defendants, who were citizens of Illinois some of whom resided in the Northern Division of the Northern District of Illinois where suit was brought the Court erred in holding that a duplicate summons could not issue to defendants residents of the Southern District of Illinois.

*E. Tenn., Va. & Ga. R. R.* v. *Atlanta & Fla. R. R.*, 49 Fed. Rep. 608;

*Goddard* v. *Mailler*, 80 Fed. Rep. 422;

*N. J. Steel & Iron Co.* v. *Chormann*, 105 Fed. Rep. 532; *Hughes* Fed. Pro. p. 234.

*II.*

Plaintiffs in error contend that section 1 of an act entitled, "Suits not of a local nature in states containing several districts," approved May 4, 1858 (11 Stat. 272), and found as Sec. 740 R. S. p. 140; and also found on page 587 of the United States Compiled Statutes, 1901, as section 740, is still in force and effect; and that the following italicized language authorized and justified the procedure adopted, and gave the court jurisdiction of the defendants by virtue of the service on them of the duplicate writ of summons.

This section reads as follows:

"When a state contains more than one district, every suit not of a local nature, in the circuit or district courts thereof, against a single defendant, inhabitant of such state, must be brought in the district where he resides; but if *there are two or more defendants, residing in different districts of the state, it may be brought in either district and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides.* The clerk issuing the duplicate writ shall indorse thereon that it is a true copy of a writ sued out of the court of the proper district and such original and duplicate writs, when executed and returned into the office from which they issued, shall constitute and be proceeded on as one suit, and upon any judgment or decree rendered therein execution may be issued, directed to the marshal of any district in the same state."

*III.*

March 2, 1887, there was approved "An act to amend section 536 of the Revised Statutes of the United States relating to the division of the State of Illinois into judicial districts and to provide for holding terms of court of the Northern District at the city of Peoria."

The 4th section of this act (24 Stat. 442; Comp. Laws, Sec. 536, p. 345), provides for the practice adopted by the plaintiffs in error.

This section reads: "That all civil suits not of a local nature and criminal prosecutions must be brought in the division of the said Northern District of Illinois where the defendant or defendants reside or the offense is committed, but if there are two or more defendants in civil suits residing in different divisions or *districts* the action may be brought in either in which either of the defendants may reside. When the defendant is a non-resident of the district action may be brought in either division of said district wherein the defendant may be found."

*U. S.* v. *Fisher,* 109 U. S. 143.

*IV.*

We have here an earlier special statute, passed March 2, 1887 (24 Stat. 442; Comp. Laws, Sec. 536, p. 345), providing that where there is more than one defendant in a suit it may be brought in any district or division in which one of such defendants resides in the State of Illinois, and we have the later general statutes in the acts of March 3, 1887 (24 Stat. 552-5), and of August 13, 1888 (25 Stat. 433-7) and the fact that the first statute is special and the other two statutes are general creates a presumption that the first special statute is to be construed as remaining an exception to the general statutes, such general statutes making no provision for the particular case where more than one defendant are parties to a suit.

*Pearce* v. *Bk.,* 33 Ala. 693;
*McFarland* v. *Bk.,* 4 Ark. 410;
*Thorp* v. *Adams,* L. R. 5, C. P. 125;

*Fitzgerald* v. *Champenys*, 30 L. J. N. S. Eq. 782;
*State* v. *Rackley*, 2 Ind. (2 Blackf.) 249;
*Stockett* v. *Bird*, 18 Md. 484, 489;
*Crane* v. *Reeder*, 22 Mich. 322;
*Fosdick* v. *Ferrysburg*, 14 O. St. 472;
*Brown* v. *Co. Com.*, 21 Pa. St. 37;
*Rounds* v. *Waymart Borough*, 81 Pa. St. 395;
*Harrisburg* v. *Sheck*, 194 Pa. St. 53;
*Morrison* v. *Fayette Co.*, 127 Pa. St. 110;
*Murdock's Pet.*, 149 Pa. St. 341;
*Ex parte Crow Dog*, 109 U. S. 556;
*Rodgers* v. *U. S.*, 185 U. S. 83.

*V.*

The court below decided the case by holding that Section 740 R. S. was repealed by implication by the act of March 3, 1875 (18 Stat. 470-3). And also by an act of March 3, 1887 (24 Stat. 552-5). And also by an act of Aug. 13, 1888 (25 Stat. 433-7).

*M'Micken* v *Webb*, 36 U. S. (11 Pet.) 25;
*Phillips* v. *Moore*, 100 U. S. 208;
*U. S.* v. *Mooney*, 116 U. S. 104;
*Ames* v. *Hager*, 36 Fed. Rep. 129;
*E. Tenn., Va. & Ga. R. R.* v. *Atlanta & Fla. R. R.*, 49 Fed. Rep. 608;
*Goddard et. al.* v. *Mailler et. al.*, 80 Fed. Rep. 422.

*VI.*

No statute has attempted to expressly repeal the provisions italicized in the statute quoted in point 2. This fact makes it clear that the proper mode of practice is provided for by such statute.

*Henderson's Tobacco*, 78 U. S. 652.

*VII.*

Where several affirmative statutes relate to the same subject matter, but have different objects, none are repealed, but all stand.

*Gibson* v. *Ackerman*, 70 Ill. App. 399;

*Casey* v. *Harned*, 5 Clark Ia. 1;
*Safe Deposit Co.* v. *Fricke*, 152 Pa. St. 231;
*Mills* v. *State*, 23 Tex. 235;
*U. S.* v. *Claflin*, 97 U. S. 546;
*People* v. *McAllister*, 10 Utah 357;
*In re Garnett*, 11 Utah 289;
*Casey* v. *Harned*, 5 Clark, Ia. 1.

*VIII.*

Repeals by implication are not favored.

*Connor* v. *So. Express Co.*, 37 Ga. 397;
*Bruce* v. *Schuyler*, 9 Ill. (4 Gilm.) 221;
*People* v. *Barr*, 44 Ill. 198;
*Casey* v. *Harnerd*, 5 Clark, Ia. 1;
*Goddard* v. *Boston*, 37 Mass. (20 Pick.) 407, 410;
*McCartee* v. *Orphan Asylum So.*, 9 Cowen 437;
*Dodge* v. *Gridley*, 10 O. 173;
*Wood* v. *U. S.*, 41 U. S. (16 Pet.) 342;
*McCord* v. *Smith*, 66 U. S. (1 Black) 459;
*Arthur* v. *Homer*, 96 U. S. 137;
*Red Rock* v. *Henry*, 106 U. S. 596;
*Ex parte Crow Dog*, 109 U. S. 556;
*Cope* v. *Cope*, 137 U. S. 682;
*Frost* v. *Wenie*, 159 U. S. 46;
*U. S.* v. *Healey*, 160 U. S. 136, 147;
*U. S.* v. *N. Y.*, 160 U. S. 598, 609;
*U. S.* v. *Greathouse*, 166 U. S. 601, 605;
*U. S.* v. *Lee Yen Tah*, 185 U. S. 213.

*ARGUMENT.*

The question presented for solution is one of first impressions in this court. The weight of authority in the lower courts and in the text books, sustains our contention as stated in our first point.

It is very plain and simple if we find Section 740 R. S. to be in force and not repealed by implication. The language of Section 740 R. S. is printed in full under our second point and is clear and plain to the effect that a duplicate summons may be issued in the district where suit is

properly brought to defendants residing in another district in the same state.

The act dividing the Northern District of Illinois into divisions (24 Stat. 442) in its fourth section by the use of the word "Districts" makes statutory provision for the practice followed by plaintiffs in error which we show in our third point. The language of this special act is substantially the same as that in Sec. 740 R. S.

Under our fourth point we shall show that an earlier special statute is not repealed by a later general statute even though the same subject matter is covered by the special and general statutes where such construction involves no inconsistency.

We shall under our fifth point quote the statutes which the trial court held repealed Section 740 R. S. by implication and show that the learned trial judge did not make proper application to this record of the principles of repeal by implication.

In our sixth point we shall show that the language in the statute under which said action was taken has never been expressly repealed.

Under our seventh point we shall seek to establish the principle that where there are several affirmative statutes concerning the same subject matter but having different objects in view all of such statutes stand and none are repealed by implication.

In our eighth point we shall call attention to what courts are called upon to reiterate that repeals by implication are not favored.

*I.*

A practitioner of law naturally looks to text books of Federal practice to learn how to commence suit and how to obtain service of summons on defendants in the Federal courts.

An examination of the text books which style themselves Federal jurisdiction, practice and procedure, reveals curious facts which may be summarized as follows:

The following text books merely copy section 740 R.

S., as a part of their text, and content themselves without making any comments:

Carter (A. D. 1899), p. 11;
Field (1883), p. 445;
1 Foster, 2nd Ed. (1892), p. 46;
Miller & Field (1881), p. 264.

Desty (1884) quotes section 740 R. S. on p. 372, and adds a note which throws no light whatever upon our topic.

The following text books neither copy section 740 R. S. or make any reference to it:

Dabney (1897);
Garland & Ralston (1898);
May (1899);
Taylor (1904).

The only text book which discusses section 740 R. S. is Hughes on the Jurisdiction of Federal Courts, p. 11, published in 1904, where the author sustains our views and uses the following language on p. 234:

"It is an unsettled question how far these statutes are repealed by the act of March 3, 1875, as amended by the acts of 1887-88. The courts have held both ways on the subject. It is certain that Section 738, as amended by these recent acts includes most of the cases covered by these statutes, but there are some cases which they do not cover, and repeals by implication are not favored. It would seem that these statutes are still in force in particulars not covered by the latter act, and could be used, at least, for the purpose of providing a simple mode of service of process in addition to that given under this later act. The question, however, is unsettled."

Our first point has been declared to be the law in *Goddard et. al.* v. *Meiller et. al.*, 80 Fed. Rep. 422. We freely quote from the opinion under our fifth point.

Although strictly *dicta* yet the reasoning of Speer, J., in *E. Tenn., Va. & Ga. R. R.* v. *Atlanta & Fla. R. R.*, 49 Fed. Rep. 608, 612, so completely establishing that the practice of the plaintiffs in error was correct that we publish such reasoning in full under our fifth point.

In an application for an order instructing the clerk for the Southern District of New York to issue a duplicate summons to the marshal of the Northern District of New York against the defendant Chormann under section 740 R. S. in *New Jersey Steel & Iron Company* v. *Chormann et. al.*, 105 Fed. Rep. 532 (December 10, 1900), Lacombe, Circuit Judge, was in doubt whether said section was repealed by subsequent legislation, but instructed the clerk to issue the duplicate summons in order that the point might be raised by plea or otherwise whether said section was repealed by implication. No further action appears to have been taken under such ruling in this case, so that we may infer that the issuing of a duplicate summons to another district, where there are defendants in both districts, has become the practice in that circuit.

*II.*

A reading of the statute is ample authority for the practice pursued in this record. We assume the statute which constitutes our second point to be in force as found in both the Revised Statutes (Sec. 740, p. 140) and the Compiled Laws (Sec. 740, pp. 587-8) of the United States.

It is a significant fact that no text book has suggested that any statute has repealed section 740, R. S. The plaintiff in error have followed in the footsteps of those authorities who have quoted the language of section 740, R. S. as still in force.

*III.*

The statute, which we have quoted in full under our third point, by the use of the word *"districts,"* has clearly provided that where diversity of citizenship gives jurisdiction and several defendants live in different districts in the State of Illinois suit may be brought in either of the two districts in which any one of the defendants may reside. The further requirement of the statute that suit shall be brought in the division of the district where one or more of the defendants reside is in harmony with and strengthens the construction of the statute for which we contend.

The State of Illinois was divided into two judicial districts by an act approved February 13, 1855 (10 Stat. 606-7). This was before the passage of Section 740, R. S. (act May 4, 1858; 11 Stat. 272), and there is no provision in any of the nine sections of this act for suits against defendants residing in different districts of the State of Illinois.

It has been the constant policy of the government to make each state into one or more judicial districts. The reason for this policy is obvious. The local laws of the different states vary and yet such local laws are to be enforced by the United States courts, as they exist in each State. Great confusion would result if the judicial districts of the United States were not confined to State boundaries.

On March 2, 1887 (24 Stat. 442, Sec. 4; Comp. Laws, Sec. 536, p. 345) the statute quoted under our third point limited the plaintiff in bringing suit to the *district* and to the division of the district in which one or more of several defendants might reside.

Such limitation clearly permitted the plaintiffs in error, who are aliens, to bring this action in the Northern Division of the Northern District of the State of Illinois, which was the residence of three of the defendants. The court having jurisdiction where suit was brought, the duplicate writ of summons could be issued and served on defendants in error who were joint defendants in the Southern District of Illinois.

It is a cardinal rule of construction that effect shall be given to every word of a statute. The statute under discussion did not use the word "Districts" without the plain purpose of giving to it its full meaning. The construction the defendants in error would put upon this statute strikes out the word "Districts." Their object is to give no force or meaning to such word. They do violence to plain principles of construction.

Justice Wood, in *U. S.* v. *Fisher*, 109 U. S. 143, declared it to be a well settled rule of interpretation of

statutes; on p. 145, that "if possible, effect must be given to every clause, section, and *word* of the statute," citing Bacon's Abr. Statute, 1, 2; *Powlter's Case,* 11 Coke, 29a, 34a; *Potter's Dwarris,* 194; Opinion of the Justices, 22 Pick. 571.

What was the condition of the statutes when this word "Districts" was used? The State of Illinois was already divided into two judicial districts (Act of February 13, 1855; 10 Stat. 606-7) and by this act (Act of March 2, 1887; 24 Stat. 442) the Northern District was divided into two divisions and the bringing of suits restricted to one of the divisions in which one of the defendants resided. It was natural for the statute to make the same policy as to the limiting of bringing suit only in the division where one or more defendant resided apply in the same way to "Districts."

The act makes certain provisions in relation to the Southern District by transferring some of the counties thereof to the Northern District; and it is to be presumed that Congress had this district in mind also when making the subsequent provision in relation to the commencement of suits.

The plaintiffs in error have followed the practice promulgated by this statute and the trial court committed error in refusing to follow it.

*IV.*

The special statute permitting the bringing of suit in any district or division of the district where any defendant resided was not repealed by the general law, which merely related to suits which included but one defendant. In such case the special or local statute containing broader provisions than the general statute both would stand and be enforced.

In *Rodgers* v. *U. S.,* 185 U. S. 83, Justice Brewer on page 87 said:

"It is a canon of statutory construction that a later statute general in its terms and not expressly repealing

a prior special statute will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the latter general—the terms of the general broad enough and including the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special unless repeal is expressly named or unless the provisions of the general are manifestly inconsistent with those of the special."

In *ex parte Crow Dog*, 109 U. S. 556, Justice Matthews on page 570 said:

"The language of the exception is special and express; the words relied on as a repeal are general and inconclusive. The rule is *generatia specialibus non derogant*, 'the general principle to be applied,' says Bovil, C. J., in *Thorp* v. *Adams*, L. R. 6, C. P. 135; 'to the construction of acts of Parliament is that a general act is not to be construed to repeal a previous particular act unless there is some expressed reference to the previous legislation on the subject or unless there is a necessary inconsistency in the two acts standing together.' 'And the reason is,' said Wood, V. C. *Fitzgerald* v. *Champenys*, 30 L. J. N. S. Eq. 782; 2 Johns. and Hem., 31-54, 'that the legislature having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do.'"

In *Crane* v. *Reeder*, 22 Mich. 232, Justice Christiancy on page 334 says:

"Where there are two acts or provisions, one of which is special and particular and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act or pro-

vision, especially when such general and special acts or provisions are cotemporaneous, as the legislature are not to be presumed to have intended a conflict."

The reporter in the third headnote explains this case as follows:

"Where there are two acts or provisions, one of which is special and particular and certainly includes the matter in question, and the other general, which, if standing alone would include the same matter, and thus conflict with the special act or provision, the special act must be taken as intended to constitute an exception to the general—especially when such conflicting provisions are cotemporaneous in their passage. Accordingly—as the general powers of the Commissioner of the land office (Sec. 2428 [Mich.] Comp. Laws), to lease, sell and dispose of public lands, can only be exercised in the manner 'directed by law,' and there being no provision of law for the sale of the escheated lands, except that contained in the special act of 1846, which commits this power to the trustees named in it—the act of 1846 must be construed as creating an exception to the general act, and therefore the sole power of selling the escheated lands is in the trustees named in the act of 1846."

A general statute without negative words will not repeal a previous statute which is particular, though the provisions in the two be different.

*Brown* v. *Co. Com.*, 21 Pa. St. 37, 43;
*Rounds* v. *Waymart Borough*, 81 Pa. St. 395, 397;
*Com.* v. *R. R.*, 164 Pa. St. 25[illegible], 261.

"A general statute, without negative words, will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent. * * * The reason and philosophy of the rule is that when the mind of the legislator has been turned to the details of a subject and he has acted upon it, a subsequent statute in general terms or treating the subject in a general manner and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to

give the latter act such a construction in order that its words shall have any meaning at all."

Sedgwick on Construction of Statutes, pages 97-8, and cases cited on pages 98 to 103.

Affirmative statutes help, not hurt each other. There is no need in the passage of affirmative statutes that the old or existing law shall be added to it so that the new statutes shall embrace the full law in the absence of constitutional provisions to that effect.

Many state constitutions like that of Illinois of 1870, Art. 4, Sec. 13, provide that "the law revised, or the section amended, shall be inserted at length in the new act."

Congress is untrammeled in this respect and is at liberty to express its intention as it may see fit. We are to gather such intentions from all statutes which stand unrepealed.

*V.*

Was section 740 R. S. (Act of May 4, 1858) (11 Stat. Sec. 1, p. 272) repealed by implication by the Act of March 3, 1875 (18 Stat. 470)? An answer to this question requires a careful consideration of the entire body of laws conferring jurisdiction upon the United States Courts. We can simplify such examination by citing the statutes quoting the language that is applicable to the particular question involved in this record.

(We contend that if the Act of March 3, 1875 (18 Stat. 470-3; Comp. Laws, Sec. 629, p. 508) repealed by implication section 740 R. S., that the subsequent similar legislation of the Acts of March 3, 1887 (24 Stat. 552-5) and of August 13, 1888 (25 Stat. 433-7) could have no effect to repeal by implication that which had been already actually repealed by implication.)

The constitution provides:

Article III, Section 2: "The judicial powers shall extend to all cases in Law and Equity arising * * * between a state, or the citizens thereof, and foreign states, citizens or subjects."

The following general acts of Congress bear on the

subject and in so far as they affect the case at bar are as follows:

First. The first Congress in passing "An act to establish the Judicial Courts of the United States," Sept. 24, 1789 (1 Stat. 72, 93), by section 11 (1 Stat. 78) provided:

"That the Circuit Courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500.00, and the United States are plaintiffs, or petitioners, or an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state, and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the District Courts of the crimes and offenses cognizable therein. But no person shall be arrested in one district, for trial in another, in any civil action, before a Circuit or District Court. *And no civil suit shall be brought before either of said courts, against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ,* nor shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favor of an assignee unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange. And the Circuit Courts, shall also have appellate jurisdiction from the District Courts, under the regulations and restrictions hereinafter provided."

Under this original act of jurisdiction it was not necessary that suit should be brought in the district in which the defendant resided. This was expressly decided in *M'Micken*

v. *Webb*, 36 U. S. (11 Pet.) 25, 38, (A. D. 1837), where the Court said:

"The question presented by the first plea to the jurisdiction of the court is, whether Webb, a citizen of the State of Louisiana, who resided in the Western District of that State, could be sued by a plaintiff, who was a citizen of the State of Ohio, in the District Court of the Eastern District of the State of Louisiana. The residence of Webb being in the Western District of Louisiana could not affect the jurisdiction of the court. The plea admits that he was a citizen of Louisiana, and the act of Congress gives jurisdiction where the suit is between a citizen of the State where the suit is brought and a citizen of another State, and the division of a State into two or more districts cannot affect the jurisdiction of the court, on account of citizenship. This plea admits that the petition and citation were served upon him in New Orleans, which takes the case out of the prohibition in the judiciary act, that no civil suit shall be brought in the courts of the United States against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ."

Second. Section 1 of "An Act to provide for the issuing, service and return of original and final process in the Circuit and District Courts of the United States in certain cases," approved May 4, 1858 (11 Stat. 272), the first section of which act is now Sec. 740 R. S., reading:

"Be it enacted, etc., That all suits, not of a local nature, hereafter to be brought in the Circuit and District Courts of the United States, in a district in any State containing more than one district, against a single defendant, shall be brought in the district in which the defendant resides, but if there be two or more defendants residing in different districts in the same State, the plaintiff may sue in either district and issue a duplicate writ against the defendants, directed to the marshal of any other district within the State in which any of the defendants reside, on

which duplicate writ the clerk issuing the same shall endorse that it is a true copy of a writ sued out of the court of the proper district, and such original and duplicate writs, so issued, shall, when executed and returned into the office from which they issued, constitute one suit and be proceeded on accordingly, and upon any judgment rendered in a suit so brought process of execution may be issued directed to the marshal of any district in the same State. And in suits of a local nature, where the defendant resides in a different district in the same State than the one in which the suit is brought, the plaintiff may have original and final process against such defendant, directed to the marshal of the district in which he resides." (11 Stat. 272; Sec. 740 R. S. Sec. 740 Comp. Laws.)

This statute we have quoted in full and made our second point. If this statute is held to be in force, and not repealed by implication such holding makes an end of this controversy.

Third. We quote in full the language which the trial court found repealed Sec. 740 R. S. by implication.

Section 1 of "An Act to determine the jurisdiction of Circuit Courts of the United States and to regulate the removal of causes from the State courts and for other purposes," approved March 3, 1875 (18 Stat. 470-3), and reading:

"Be it enacted, etc., That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, * * * in which there shall be * * * a controversy between citizens of a state and foreign states, citizens or subjects. * * * And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving such process or commencing

such proceeding, except as hereinafter provided." (18 Stat. 470.)

Fourth. The following language was also found to retain such repeal by implication:

Section 1 of "An Act to amend the act of Congress approved March 3, 1875, entitled 'An Act to determine the jurisdiction of Circuit Courts of the United States and to regulate the removal of causes from State courts and for other purposes and to further regulate the jurisdiction of Circuit Courts of the United States and for other purposes;' approved March 3, 1887 (24 Stat. 552-5), and reading:

"Be it enacted, etc., That the first section of an act entitled 'An Act to determine the jurisdiction of Circuit Courts of the United States and to regulate the removal of causes from State courts and for other purposes,' approved March 3, 1875, be, and the same is hereby, amended so as to read as follows: 'That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, and * * * in which there shall be * * * a controversy between citizens of a State and foreign states, citizens or subjects. * * * And no civil suit shall be brought before either of said courts against any person by any original process of proceeding in any other district than that whereof he is an inhabitant. But where the jurisdiction is founded only on the fact that the action is between citizens of different states suit shall be brought only in the district of the residence of either the plaintiff or the defendant." (24 Stat. 552-3.)

Fifth. The following language in act of August 13, 1888 (25 Stat. 433-7), was also held to confirm such repeal by implication:

"An Act to correct the enrollment of an act approved March 3, 1887, entitled, 'An Act to amend Sections 1, 2, 3 and 10 of an act to determine the jurisdiction of the Cir-

cuit Courts of the United States and to regulate the removal of causes from the State courts and for other purposes, approved March 3, 1875,'" approved August 13, 1888, and reading:

"Be it enacted, etc., That the Act approved March 3rd, 1887, entitled, 'An Act to amend sections 1, 2, 3 and 10 of an Act to determine the jurisdiction of the Circuit Courts of the United States and to regulate the removal of causes from State courts and for other purposes, approved March 3rd, 1875, 'be, and the same is, hereby amended so as to read as follows:

"Be it enacted, etc., That the first section of an Act entitled 'An Act to determine the jurisdiction of Circuit Courts of the United States and to regulate the removal of causes from State courts and for other purposes,' approved March 3rd, 1875, be, and the same is, hereby amended so as to read as follows: That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, * * * in which there shall be * * * a controversy between citizens of a State and foreign states, citizens or subjects, * * * And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states suit shall be brought only in the district of the residence of either the plaintiff or the defendant." (25 Stat. 433-4.)

The opinion of the trial court that section 740 R. S. was repealed by implication by the act of March 3, 1875 (18 Stat. 470-3); and by the act of March 3, 1887 (24 Stat. 552-5); and also by the act of August 13, 1888 (25 Stat. 453-7), is ably and fully answered by the following opinions:

In *E. Tenn., Va. & Ga. R. R.* v. *Atlantic & Fla. R. R.*,

49 Fed. Rep. 608 (A. D. Feb. 24, 1892), Speer, District Judge, said on p. 612:

"The Act of Congress, prescribing the place where a person may be sued, is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of the defendant, and it is one which he may waive. *Ex parte Schollenberger*, 96 U. S. 369. Assuming, for the present, that the defendant corporation will waive nothing, it becomes important to determine, by an analysis of the line of statutes upon this subject, whether jurisdiction has been affirmatively conferred upon this court. The eleventh section of the judiciary act of 1789, following clauses which conferred jurisdiction on the circuit courts in all suits of a civil nature at common law and in equity, on account of diversity of citizenship, federal questions, alienage, etc., provided as follows:

"But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against the inhabitants of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." See Sec. 739, R. S. (1 Stat. p. 79, Sec. 11.)

"The next provision upon this subject will be found in the act of May 4, 1858 (11 Stat., p. 272). That act contained but two sections, both of which relate to the *locus* of suits where there is more than one district in the same State. The first of these sections provided that, where there is more than one district in a State, the suit, if not of a local nature, and if against a single defendant, must be brought in the district where the defendant resides; but, if there are two or more defendants residing in different districts of the same State, the plaintiff may sue in either district. *Vide* section 740, R. S. And, in suits of a local nature, where the defendant resides in a district in the same State different from that in which the suit is brought, the plaintiff may have original process against such defendant

directed to the marshal of the district in which he resides. *Vide* Sec. 741, R. S.

The second section provided:

"That, in all cases of a local nature, at law or in equity, where the land or other subject matter of a fixed character lies partly in one district and partly in another within the same State, the plaintiff may bring his action or suit in the circuit or district court of either district, and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed as fully as if the said subject matter were wholly within the district for which said court is constituted." *Vide* section 742, R. S. * * *

To summarize the result of our examination, it appears that, when the revision of the statutes had been made, the following provisions relative to the *locus* of suits in the circuit court were in full force:

First. The provision in the eleventh section of the judiciary act that suits of a civil nature should be brought in the district court of which the defendant was an inhabitant, or in which he might be found. This has been embodied in section 739, R. S.

Second. *That suits not of a local nature, where there are joint defendants residing in different districts of the same State, might be brought in either district.* This part of the act of 1858 is expressed in section 740, R. S.

Third. That in suits of a local nature, where the defendant resides in a district in the same State different from that district in which the suit is brought, the plaintiff may have original process sent into the other district, and served upon the defendant there. This clause of the act of 1858 was embodied in section 741, R. S.

Fourth. That suits of a local nature, where the land or other subject matter of a fixed character lies partly in one district and partly in another within the same State, may be brought in either district, and the court in which they are brought shall have plenary jurisdiction to hear and decide them, to issue and control the process, as if

the subject matter were wholly within the district for which such court is constituted. The compilers embrace this clause in section 742, R. S.

Fifth. The provision for procedure to effect service upon defendants in suits of a local nature, where the defendants are out of the territorial jurisdiction of the court, so that the judgment can be operative upon the property within such jurisdiction. This provision was made by act of 1872, and is embodied in section 738, R. S.

It is contended, however, by counsel who resist this motion, that all these special provisions relating to suits brought in states where there is more than one federal judicial district were superseded by the provisions of section 1 of the act of March 3, 1875. This, they claim, was intended to cover the entire subject, and to indicate the locality in which civil suits in the circuit and district courts might be brought. They rely on the language:

"No civil suit shall be brought before either of said courts against any person, by any original process or procedure, in any other district than that whereof he is an inhabitant, or in which he is found at the time of serving such process."

They insist, moreover, that the amendatory acts of March 3, 1887, and August 13, 1888, had the effect to repeal these provisions above enumerated by implication. Let us consider these propositions in the order of their statement. An analysis of the first section of the act of March 3, 1875, makes it apparent that it is a substitute for the eleventh section of the judiciary act of 1789, the provisions of which, so far as they confer general jurisdiction on the circuit court, were embodied in subdivisions 1, 2 and 3 of Section 629 of the Revised Statutes, and, so far as they prescribed the appropriate district in which the suit might be brought, were embodied in section 739 of the Revised Statutes. *Ames* v. *Hager*, 36 Fed. Rep. 129; *U. S.* v. *Mooney*, 116, U. S. 104. That act contained no provisions covering the special cases provided for in the act of May 4, 1858, which, we have seen, is embodied in sections 741,

742, R. S., which relate to joint defendants in different districts of the same State and to suits of a local nature affecting property within the jurisdiction. It was not the intention of Congress, by the act of March 3, 1875, to do away with all the salutary statutes conferring special jurisdiction upon the circuit and district courts. 'The intention of the lawmaker constitutes the law. A thing may be within the letter of a statute and not within its meaning, or within its meaning and not within its letter. In cases admitting of doubt, the intention of the lawmaker is to be sought in all the context of the section, statutes, or series of statutes, *in pari materia*.' This language is used by Mr. Justice Swayne, for the court, in the case of *Atkins* v. *Disintegrating Co.*, 18 Wall., *272*; and the learned justice applied the doctrine by the announcement that, although an admiralty case is a 'civil suit,' the prohibition in the eleventh section of the judiciary act had no reference to it. A decision more directly in point is the case of *U. S.* v. *Mooney*, 116 U. S. 104, where Mr. Justice Woods, in delivering the opinion of the court used the language following:

'How, then, can the substantial re-enactment of section 11 (of the judiciary act ) by the act of March 3, 1875, with modifications immaterial, as far as the question in hand is concerned, have an effect which the original section did not? * * * To sustain the contention of the plaintiffs, we must hold that the purpose of section 1 of act of March 3, 1875, was to repeal by implication, and to supersede, all laws conferring jurisdiction on the circuit courts, and, of itself, to cover and regulate the whole subject. But this construction would lead to consequences which it is clear Congress did not contemplate. The act of 1875, it is clear, was not intended to interfere with the prior statutes conferring jurisdiction upon the circuit or district courts in special cases and over particular subjects. Its purpose was to give to the circuit courts a jurisdiction which the federal courts did not then possess, by enlarging their jurisdiction in suits of a civil nature, in common law or in equity,

and not to take away from the circuit or district courts jurisdiction conferred by prior statutes.'

That the scope of the first section of the act of 1875 was to be limited to the general jurisdiction of the courts, conferred by the eleventh section of the judiciary act was distinctly held by Circuit Judge Sawyer in *Ames* v. *Hager*, 36 Fed. Rep. 129; by this court in *U. S.* v. *Shaw*, 39 Fed. Rep. 433; and by Judge Barr, in Kentucky, in *U. S.* v. *River Mills*, 45 Fed. Rep. 273. It follows, therefore, that the special cases for which provision was made by the act of May 4, 1858, embodied in sections 740, 741 and 742 of the Revised Statutes, relating to the locality of suits in the States, containing more than one district, were not within the contemplation of Congress when that act was enacted, and are not repealed by it. The language of that act, so far as it requires suits to be brought in the district of which the defendant is an inhabitant, or in which he is found, is not at all different from the eleventh section of the judiciary act. This was co-existent with the act of 1858, and, as we have seen, was embodied in section 739 of the Revised Statutes by the compilers, as an independent provision, not at all in conflict with the legislation conferring jurisdiction, and making it effective in the special cases indicated in sections 740, 741 and 742 of the Revised Statutes; all of which were re-enacted by the adoption of the revision simultaneously with it. The provisions of the act of March 3, 1887, and of August 13, 1888, amendatory of the act of 1875, in respect to the questions under discussion. are in no particulars different from the latter act. These recent statutes, therefore, are likewise within the range of the authority of *U. S.* v. *Mooney*, supra, and, in the opinion of the court, clearly did not repeal sections 740, 741 and 742 of the Revised Statutes. It is moreover true that, if we trace the same provision through the numerous acts of Congress passed since the act of 1875, and since the act of 1888, whereby other divisions of judicial districts are created in the several states, it will be observed that suits of a local nature are always excepted from the provisions changing

the locality of suits, or requiring subsequent suits against its residents to be brought within the new divisions."

In *Goddard et al.* v. *Mailler et al.*, 80 Fed Rep. 422, the opinion was given May 7, 1897, by Judge Coxe, District Judge for the Southern District of New York, sitting in the Circuit Court.

The action was by ten stockholders of the Bowery Insurance Company against its receivers and directors, praying for an accounting. The complainants were citizens of Rhode Island and Maryland and the defendants were citizens of New York, New Jersey, Illinois and Kentucky. The sole ground of jurisdiction was the diverse State citizenship of the parties. The defendant Mailler filed a plea disputing the jurisdiction of the court upon the ground that he was not an inhabitant of the Southern District of New York but resided in the Eastern District. The court, p. 423, says:

"The question then is narrowed to the simple inquiry, has section 740 been repealed by subsequent legislation? The section has not been expressly repealed; it is not mentioned *eo nomine* either in the act of 1875 or in the act of 1888. The act of 1875 (18 Stat. 470), after enacting that 'no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he may be found at the time of serving such process,' etc., repeals all acts and parts of acts in conflict therewith. The act of 1888 expressly provides that it shall in no way affect any jurisdiction or right mentioned in sections 641-643, 722 and title 24 of the Revised Statutes, or section 8 of the act of March 3, 1875, or the civil rights act of March 1, 1875. The act of 1888 expressly repeals the last paragraph of section 5 of the act of March 3, 1875, section 642 of the Revised Statutes and 'all laws and parts of laws in conflict with the provisions of this act.' The question here involved has never been directly decided by the Supreme Court. * * * Repeal by implication is not favored.

If the earlier law be not plainly in conflict with the later law it should stand. If effect may be given to both it is the plain duty of the court to uphold the earlier law. 'No statute should be construed as repealing a prior one, unless so clearly repugnant thereto as to admit of no other reasonable construction.' * * * The court is unable to see that the language quoted from section 740 is inconsistent with the provisions of section 1 of the act of 1888. It provides for a contingency not mentioned in the act. If Congress had incorporated it in the act of 1888 the first section would be consistent and harmonious. * * * A contrary ruling would close the federal courts to citizens of different states if the defendants, though living within a mile of each other, and even in the same city, happen to live in different judicial districts. * * * The court is of the opinion that the clause in question may with consistency be retained, that it is not in conflict with the law of 1888, and, therefore, that its repeal should not be declared."

We are content to rest upon the reasoning of these cases that section 740 R. S. is still in full force and effect.

The following cases involve questions identical in principle with the one at bar:

In *Phillips* v. *Moore,* 100 U. S. 208, on page 213, Justice Field said:

"As to the trial by the court, it is sufficient to observe that a jury was waived by stipulation of the parties, filed with the clerk under the act of Congress. R. S. Sec. 649. The concluding clause of the third section of the act of March 3, 1875, 'to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes,' does not repeal the previous law, authorizing a trial by the court. without the intervention of a jury, upon such stipulation. It was only intended to conserve to parties in the cases removed to the circuit courts the same right of jury trial which parties possess in cases brought originally in those courts, not to prevent the waiver of a jury by consent. The

provision is similar to the one in the judicature act of 1879. 18 Stat. 471, *Kearney* v. *Case*, 12 Wall 281."

In *U. S.* v. *Mooney*, 116 U. S. 104, it was held that "the exclusive jurisdiction conferred upon District Courts of the United States before the enactment of the Judiciary Act of March 3, 1875, over suits for the recovery of penalties and forfeitures under the Customs laws of the United States, is not taken away by the first section of that act."

In *Ames* v. *Hager*, 36 Fed. Rep. 129, the headnote reads:

"Clause 4, Section 629, Revised Statutes, was not repealed by the act of March 3, 1875 (18 Stat. 470), or by the act of March 3, 1887 (24 Stat. 552), defining the jurisdiction of the circuit courts, and these courts have jurisdiction in suits arising under revenue laws, although the amount in dispute is less than $2,000.00."

The counsel in the trial court urged that the act of March 2, 1872, entitled "An Act to amend Section 536 of the Revised Statutes of the United States relating to the division of the State of Illinois into judicial districts and to provide for holding terms of court of the Northern District at the City of Peoria," (24 Stat. 442; Comp. Laws, Sec. 637, p. 345), the fourth section of which act is made our third point, was in fact repealed by the Act of March 3, 1887 (24 Stat. 552-5), entitled "An Act to amend the act of Congress, approved March 3, 1875, entitled 'An Act to determine the jurisdiction of the Circuit Court of the United States, to regulate the removal of causes from the said courts and for other purposes and to further regulate the jurisdiction of the Circuit Court and for other purposes'" (24 Stat. 552; Comp. Laws, Sec. 629, p. 508).

The above act of March 2, 1887, was the earlier law by one day, and it is claimed upon well-established principles that the last expression of the legislative rule will govern, that the language in the act of March 2, 1887, which provided that "If there are two or more defendants in civil suits residing in the different divisions or districts action may be brought in either in which either of the defendants

may reside" (24 Stat. 442, Sec. 4), was repealed by the language of the above act of March 3, 1887, which reads that "no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but when jurisdiction is founded on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." (24 Stat. 552-3, Sec. 1.)

The same Congress passed these acts, one act (March 2, 1887) to be the special provision of the State of Illinois and the other to be the general law (March 3, 1887), it is evident that Congress intended both of these affirmative acts to stand together and to be enforced consistently with the full provisions of both statutes.

Endlich on Int. Stat. Sec. 223, p. 298 and n. a.

We have fully and fairly stated the contentions of defendants in error and we submit that such claims do not repeal by implication such statutory provisions as authorize where there are two or more defendants, residents of different districts, the issuance and service of a duplicate summons to another district than that in which suit is brought.

## *VI.*

No claim was made in the trial court and we assume will not be made before this court that any express repeal of section 740 R. S. has been made.

The act of March 3, 1875, by Section 10 (18 Stat. 470-3), provided that all acts and parts of acts "in conflict with the provisions of this act are hereby repealed." The act of March 3, 1887 (24 Stat. 552), by Section 6, p. 555, provided "That the last paragraph of Section 5 of the act of Congress, approved March 3, 1875, entitled 'An Act to determine the jurisdiction of the Circuit Courts of the United States and to regulate the removal of causes from State Courts and for other purposes,' and Section 640 of the

R. S. and all laws and parts of laws in conflict with the provisions of this act be and the same are hereby repealed; provided, that this act shall not affect the jurisdiction over or disposition of any suit removed from the court of any State or suit commenced in any court of the United States before the passage hereof except as otherwise expressly provided in this act."

The act of August 13, 1888 (25 Stat. 433), by Section 6, page 436, used the identical repealing words just quoted in the act of March 3, 1887. The provisions of this repealing clause clearly show that no repeal has occurred of Section 740 R. S.

In *Henderson's Tobacco*, 78 U. S. 652, Justice Strong in construing the language of repealing clauses, used the following language on page 656:

"The 105 section enacts 'that all acts and parts of acts inconsistent with the provision of this act are hereby repealed.' This is an express limitation of the extent to which it was intended former acts should cease to be operative, namely, only so far as they are inconsistent with the new act. It is quite inadmissible to engraft upon this express declaration of legislative intent an implication of more extensive repeal. Statutes are, indeed, sometimes held to be repealed by subsequent enactments, though the latter contain no repealing clauses. This is always the rule when the provisions of the latter acts are repugnant to those of the former, so far as they are repugnant. The enactment of provisions inconsistent with those previously existing, manifests a clear intent to abolish the old law. In the *U. S.* v. *Tynen* (11 Wall 88), it was said by Mr. Justice Field, that 'when there are two acts upon the same subject, the rule is to give effect to both, if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not, in express terms, repugnant, yet, if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a sub-

stitute for the first act, it will operate as a repeal of that act.' For this several authorities were cited, some of which have been cited on the present argument. This is, undoubtedly, a sound exposition of the law. But it must be observed that the doctrine asserts no more than that the former statute is impliedly repealed, *so far* as the provisions of the subsequent statute are repugnant to it, or *so far* as the latter statute, making new provisions, is plainly intended as a substitute for it. Where the powers or directions under several acts are such as may well subsist together, an implication of repeal cannot be allowed."

It is clear that if the act of March 3, 1875 (18 Stat. 470) (Comp. Laws, Sec. 629, p. 508), repealed by implication Section 740, Revised Statutes, that the subsequent legislation of the acts of March 3, 1887 (24 Stat. 552-5) (Comp. Laws, Sec. 629, p. 508), and its amendment by the act of August 13, 1888 (25 Stat. 433-7) (Comp. Laws, Sec. 629, p. 508) cuts no figure in this controversy. If in fact a repeal was accomplished by the act of 1875, the similar acts of 1887 and 1888 have no bearing upon the question at issue.

*VII.*

We may concede that the same subject matter is embraced by the different acts of Congress with the qualification that the practice and jurisdiction acts are general and the other localized to the State of Illinois. It is apparent from an inspection of the two acts that the object of the two was different. To confine our attention to the matter under investigation the general statutes only refer to and cover actions in which only one defendant was a party. But the statute applicable to the State of Illinois referred to and covered actions in which two or more defendants residing in different districts and divisions of districts were involved. The general statute used the word 'district" only, making no mention of divisions of districts. The statute applicable to Illinois in suits having but one defendant agrees with the general statutes and the language of the various acts in this respect is identical, that suits shall be

brought in the district where the defendant resides, but the statute concerning Illinois further limits such jurisdiction to the division of the district in which the single defendant resides. The statute for Illinois by a provision which is not covered by the general statute allows suit to be brought where there are two or more defendants in the district and division of such district where one or more of such defendants reside. The local Statute leaves to the general law (Sec. 740 R. S.) the details and power of issuing dupliçate summons to defendants residing in other districts or divisions than that in which suit is brought.

We claim the general law does not modify the practice that where there are two or more defendants residents of different districts that a duplicate summons may issue to another district than that in which suit is brought for the purpose of serving a resident defendant of such district.

In *re Claflin*, 97 U. S. 546, the headnote reads:

"A statute covering the whole subject matter of a former one, adding offenses and varying the procedure operates not cumulatively, but by way of substitution and therefore, impliedly repeals it. In the absence of any repealing clause it is, however, necessary to the implication of a repeal that the objects of the two statutes are the same. If they are not, both statutes will stand, though they refer to the same subject."

In *Gibson* v. *Ackerman*, 70 Ill. App. 399, the first headnote reads:

"Repeals by implication are not favored, and in order to work a repeal, a new law, if it contains no express words repealing the old law, must be repugnant to it, and the repugnancy must be clear. The new law must fully embrace the whole subject of the old law, and as a general rule such parts of the old law as may be incorporated into the new law consistently therewith must be considered in force."

The facts were that a new affirmative chapter of the Revised Statutes of Illinois concerning justices and constables was enacted in 1895 which omitted provisions giving a statutory right of appeal by certorari and it was held

that such provisions, although a substitute, did not repeal the right to a statutory appeal by certorari. The principle decided in this case is that without repealing words in the new statute which relates to several remedies contained in the old statute, which new statute covers several remedies but omits one or more, such omitted remedy exists after the passage of the new statute without repealing words precisely as they stood in the old statute.

Where the whole purview of the two statutes is different, and there is no essential repugnancy between them, they will stand together in the absence of a repealing clause, even though they refer to the same object. In *re* Gannett, 11 Utah 289; *Mills* v. *State*, 23 Tex. 295.

"When the latter enactment is worded in affirmative terms only, without any negative, expressed or implied, it does not repeal the earlier law." 23 Am. & Eng. Ency., 483.

In the absence of any repealing clause, it is necessary to the implication of a repeal that the object of the statutes, as well as the subject be the same. If they are not, both statutes will stand, although they refer to the same subject. 23 Am. & Eng. Ency., 482.

In *People* v. *McAllister*, 10 Utah 357, on page 367, it is said: "Both statutes must be construed together and be given effect, if possible, for a repeal by implication is not favored in law. Even where some of the provisions of a former statute are inconsistent or repugnant to a later one, the repeal by implication will operate only to the extent of such inconsistency or repugnancy. When, as in the case at bar, there is a difference in the purview of two statutes, though relating to the same subject, the former is not repealed by the latter, in the absence of a repealing clause; and the legislature when enacting the latter law, is presumed to have knowledge of all former laws relating to the same subject. The doctrine of repeal by implication proceeds on the ground that it was the intention of the legislature, and such intention must be manifest before the

repeal can become effectual." *U. S.* v. *Claflin*, 97 U. S. 546; Sutherland St. Const. Secs. 138, 160.

"The more natural if not necessary inference is that the legislature intended the new law to be auxiliary to and in aid of the purposes of the old law."

*Safe Deposit Co.* v. *Fricke*, 152 Pa. St. 231, 238.

In *Casey* v. *Harned*, 5 Clark, Ia. 1, Wright, C. J., said on page 9: "Where two acts of the General Assembly are repugnant to, or in conflict with, each other, the one last passed, being the latest expression of the legislative will, must govern. But this rule is no better settled than the further one, that if by a fair and reasonable construction a prior and later statute can be reconciled, both shall stand."

## *VIII.*

Repeals by implication are never favored.

There are two kinds of repeals recognized in law—express and implied. There has been no express repeal of section 740, R. S. Act May 4, 1858; 11 Stat. 272, in any subsequent legislation. The question, therefore, is was this section impliedly repealed by the acts of March 3, 1875 (18 Stat. 470), or March 3, 1887 (24 Stat. 552-5), or August 13, 1888 (25 Stat. 433-7).

"Repeals by implication are not favored. A statute will not be construed as repealing prior acts on the same subject (in the absence of express words to that effect) unless there is an irreconcilable repugnancy between them, or unless the new law is evidently intended to supersede all prior acts on the matter in hand and to comprise in itself the sole and complete system of legislation on that subject."

Black on Interpretation of Laws, 112, and cases cited.

"It is a rule founded in reason as well as in abundant authority, that, in order to give an act not covering the entire ground of an earlier one, nor clearly intended as a substitute for it, the effect of repealing it, the implication of an intention to repeal must necessarily flow from the lan-

guage used, disclosing a repugnancy between its provisions and those of the earlier law so positive as to be irreconcilable by any fair, strict or liberal construction of it, which would, without destroying its evident intent and meaning, find for it a reasonable field of operation, preserving, at the same time, the force of the earlier law and construing both together in harmony with the whole course of legislation upon the subject."

Endlich on Interpretation of Statutes, page 281, section 210.

In *Arthur* v. *Homer*, 96 U. S. 137, Justice Hunt on p. 140 said: "To induce the repeal of a statute by the implication of inconsistency with a latter statute, there must be such a positive repugnancy between the two statutes that they cannot stand together. * * * In the present case, the statutes are in perfect harmony, and there is no room for the theory of repeal by implication."

In *Red Rock* v. *Henry*, 106 U. S. 596, Justice Woods on p. 601 said: "The leaning of the courts is against repeals by implication, and if it be possible to reconcile two statutes, one will not be held to repeal the other."

In *ex parte Crow Dog*, 109 U. S. 556, Justice Matthews on page 570 says:

"A meaning can be given to the legislation in question which the words will bear which is not unreasonable and which is not inconsistent with its scope and apparent purposes, whereby the whole may be made to stand. Implied repeals are not favored. The implication must be necessary. There must be a positive repugnancy between the provisions of the new laws and those of the old." (Cases cited.)

In *Frost* v. *Wenie*, 157 U. S. 46, Justice Harlan on p. 58 said:

"It is well settled that repeals by implication are not to be favored, and where two statutes cover in whole or in part the same matter and are not absolutely irreconcilable the duty of the court—no purpose to repeal being clearly expressed or indicated—is if possible to give effect to both.

In other words, it must not be supposed that the legislature intended by the latter statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject and therefore to displace the prior statute."

In *Connor* v. *So. Exp. Co.*, 37 Ga., 397, the court said, on p. 399:

"Repeals of laws by implication are not to be favored, and when, by a fair and liberal construction, they can, without torture, be made to harmonize, no court will be justified in deciding that the last act repealed the first."

In *Bruce* v. *Schuyler*, 9 Ill. (4 Gilm.) 221; on p. 272 it is said:

"The doctrine of repeal by implication is not favored by the law, and is never resorted to, except when the repugnance or opposition is too clear and plain to be reconciled. The rule of law is that all laws in *pari materia* are to be construed together, that no clause, sentence or word of any law, shall be superfluous or insignificant."

This case is followed in *Fowler* v. *Pirkins*, 77 Ill. 271, 274.

In *People* v. *Barr*, 44 Ill. 198, Breese, J., in holding that a repeal by implication is not to be favored, on p. 201 said:

"If statutes are seemingly repugnant, it is the duty of courts to construe them that the latter shall not repeal the former by implication."

In *Casey* v. *Harned*, 5 Clark, Ia. 1, 10, Wright, J., said:

"The intention of the legislature to repeal the statute or any part of it is manifested, if shown by the use of express repealing words or terms or by the use of such language as is equivalent to an express repeal. If it can be avoided no court will conclude that a statute is repealed by implication.

Such repeals are not favored. Effect will be given by the courts, to several statutes upon the same subject, if possible."

As stated by Maxwell, "One of these presumptions is that the legislature does not intend to make any [illegible]eration in the law beyond what it explicity declares, either in express terms or by unmistakable implication; or, in other words, beyond the immediate scope and object of the statute. In all general matters beyond, the law remains undisturbed. It is in the last degree improbable that the legislature would overlook fundamental principles, infringe rights or depart from the general system of law, without expressing its intention with irresistible clearness, and to give any such effect to general words simply because in their widest and perhaps natural sense they have that meaning would be to give them a meaning in which they were not really used." Maxwell on the Interpretation of Laws (2d Ed.) 96.

We forbear to do more than call the attention of the Court to the fact that the legislative policy of Congress has been constant without a break in passing acts dividing judicial districts into divisions to require that suits shall be brought where there is but one defendant in the division of the district where he resides, but that in cases in which there is more than one defendant suit may be brought in any division of the district in which any one defendant may reside.

These statutes are collected and quoted in 1 Foster on Federal Practice, p. 46, at the time such work was published in 1892.

In conclusion we insist that the general act of May 4, 1858 (11 Stat. 27; Sec. 740 R. S.; Comp. Laws, Sec. 740, p. 587), and the special act of March 2, 1887 (24 Stat. 442; Comp. Laws, Sec. 536, p. 345), are both in full force and authorized the issuance of the duplicate writ of summons by the clerk of the Northern Division of the Northern District of Illinois to the Southern District and the service by the marshal of said Southern District upon the defendants in error in said Southern District. If we are right in

such contention it follows that the trial court erred in sustaining pleas to its jurisdiction.

Respectfully submitted,

CONSIDER H. WILLETT,
*Atty. for Plaintiffs in Error.*

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Clerk

# Supreme Court of the United States

OCTOBER TERM, 1904.

No. 49 (19,398)

HAROLD PETRI, CARL BOPP AND VICTOR POELS, Co-partners, doing business under the name of Petri & Company, Plaintiffs in Error,

*vs.*

THE F. E. CREELMAN LUMBER COMPANY AND FRANK E. CREELMAN, Defendants in Error.

**In Error to the Circuit Court of the United States for The Northern Division of the Northern District of Illinois.**

## MOTION TO DISMISS WRIT OF ERROR.

Additional Brief of Plaintiffs in Error on motion to dismiss writ of error.

CONSIDER H. WILLETT,
Attorney for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1904.

No. 298 (19,398).

Harold Petri, Carl Bopp and Victor Poels, co-partners, doing business under the name of Petri & Company, Plaintiffs in Error,

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In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

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## MOTION TO DISMISS WRIT OF ERROR.

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### Additional Brief of Plaintiffs in Error on motion to dismiss writ of error.

In our original brief on the motion to dismiss we urged and relied upon the fact that the record, the judgment order, showing that the only question involved was one of jurisdiction took the place of a certificate of a judge that the only question was one of jurisdiction. The authorities cited were ample to sustain this contention.

But as we deem it proper to sustain our writ of error to urge the proposition that the judge whose clerk has custody of the record can at any time when a writ of error is sued out make the proper certificate that the only question involved is one of jurisdiction. The only limitations to the right to this certificate that the only question is one of jurisdiction, is the statutory limitation to a writ of error.

The *modus operandi* to obtain a writ of error requires a petition by the plaintiffs in error (Transcript of record, 4) an assignment of errors (Transcript of record, 6) the approval of a bond for costs, or if a supersedeas is sought, a bond to pay the judgment if it is affirmed; and in a case when the only question is one of jurisdiction a certificate of a judge to that effect. Every one of the details to obtain a writ of error may be done at the time the writ of error is sought. Each act for a writ of error may be done by the judge whose clerk has custody of the record in which the writ of error is sought.

In this additional brief to sustain the jurisdiction of this court we submit one new idea in the statutory command that certificates of divisions of opinion must be filed at the terms of court when the judgment is rendered. The opinion and judgment of the senior or presiding judge became the judgment of the court and to modify such record the certificate of division of opinion must be filed at the same term of court in compliance with the statutory command of Section 652 R. S. which reads:

"When a final judgment or decree is entered in any civil suit or proceeding before any Circuit Court held by a Circuit Justice and a District Judge, in the trial or hearing whereof any question has occurred upon which the opinions of the Judges were opposed, the point upon which they so disagree shall, *during the same term,* be stated under the direction of the Judges and certified, and such certificate shall be entered of record."

Such certificate makes a new record which would not exist except by the making of such certificate. The statute which creates the right to make it; limits such certificate to the term of court when the judgment order which it modifies is entered so that substantially it is a part of such judgment order to be entered with it and becoming a part of it. It is utterly unlike a certificate that the record contains only a question of jurisdiction which must be made from an examination of the record. This last cer-

tificate unlike the other certificates adds nothing to the record. From an inspection of the record it simplifies it and puts into a condensed shape the fact that no question is embraced in the record save that of jurisdiction.

## BILL OF EXCEPTIONS.

In answer to the case of Western Dredging & Improvement Co. v. Heldmaier 111 Fed. Rep. 123 we call attention to the fact that the bill of exceptions after being stricken out because signed by Judge Kohlsaat instead of Judge Sanburn was afterward signed by him and filed *nunc pro tunc*. Western Dredging & Improvement Co. 116 Fed. Rep. 176.

We are impressed with the conviction that the act of June 5, 1900, 31 Stat., 271, where provision is made for another than a trial judge to sign a bill of exceptions, should, in the following clauses have the word "and" substituted where "or" occurs, in order to reach the meaning of the statute as clearly indicated by its context. Where the judge, "by reason of death, sickness *or* (and) other disability, is unable to hear and pass upon the motion for new trial and allow and sign said bill of exceptions, then the judge who succeeds such trial judge *or* (and) any other judge of the court in which the cause was tried, holding such court thereafter, if the evidence in such cause has been *or* (and) is taken in stenographic notes, *or* (and) if the said judge is satisfied, by any other means, that he can pass upon such motion and allow a true bill of exceptions, shall pass upon said motion and allow and sign such bill of exceptions."

"And" is substituted for the word "or" in the following cases to reach the intent of the parties and lawmakers:

McConkey v. Sup. Ct. 56 Cal. 83;
Boyles v. Murphy, 51 Ill. 236;
People v. Van Cleave, 187 Ill., 125, 133;
State v. Brandt, 41 Ia. 593, 615;
Clay v. R. R. 84 Ga. 345, 348;

Vance v. Gray, 72 Ky. 556;
Williams v. Williams, 91 Ky. 547;
Singluff v. Johns, 87 Md. 273;
State v. Bulling, 100 Mo. 87, 93;
Price v. Forrest, 54 N. J. Eq. 669, 683;
Sparrow v. Davidson Coll., 77 N. C. 35;
Foster v. Comw., 8 Watts & S. 77;
Murry v. Keyes, 35 Pa. St. 384, 391;
Massie v. Jordan, 69 Tenn. 646;
N. Springs Water Co. v. Tacoma, 21 Wash. 517;
Or was read and "In a fictitious or pretended lottery."
Comw. v. Harris, 95 Mass. (13 Allen) 534;
In burglary "to break or enter"
Rolland v. Comw., 82 Pa. St. 306, 326.

In U. S. v. Fisk, 70 U. S. (3 Wall.) 445 on p. 447, Justice Grier said; "In the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislation. In order to do this, court are often compelled to construe 'or' as meaning 'and,' and again 'and' as meaning 'or'."

In Ayers v. Chicago T. & T. Co., 187 Ill. 42, on p. 56, the court said: "It is well settled that the word 'or' and 'and' will not have their literal meaning when to give them their literal meaning renders the sense of a statutory enactment dubious."

Take the case at bar, and it shows the inconvenience of a strict instead of a liberal construction of such statute. Judge Kohlsaat, in the bill of exceptions, did no more than recite what already appeared of record, that the pleas to the jurisdiction were sustained. To require Judge Humphrey to travel from Springfield to Chicago, Illinois, wasting one or two days' time, also causing an expense to the government, when Judge Kohlsaat, under the circumstances disclosed, could as well sign the bill of exceptions as the particular judge who tried the case.

The abuse of the statute so construed if it came should be corrected by another bill of exceptions showing that the

bill of exceptions was signed under improper circumstances. The presumption should prevail that the authority existed for Judge Kohlsaat to sign the bill of exceptions.

A construction of this statute is a practical and important question but as applied to the present record it is shown in our other brief that we place no reliance upon the bill of exceptions because the question of jurisdiction satisfactorily appears from the judgment order. The certificate that the only question in the record is one of jurisdiction is full and complete to show all the details upon which said question of jurisdiction arises.

Respectfully submitted,

CONSIDER H. WILLETT,

Attorney for Plaintiff in error.

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# Supreme Court of the United States

## October Term, 1904

No. 295 [illegible]

Supreme Court
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Harold Perl, Carl Boos and Victor Poels, Co-partners doing business under the name of Perl and Company,

*Plaintiffs in Error,*

vs.

F. E. Creelman Lumber Company, a corporation, and Frank E. Creelman,

*Defendants in Error.*

Error to the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

## MOTION BY DEFENDANTS IN ERROR TO DISMISS WRIT OF ERROR AND BRIEF AND ARGUMENT IN SUPPORT THEREOF

JOHN M. JANSEN,
ANGUS MEEK,
DAVID S. JANSEN and
M. PAUL NOYES,
Attorneys for Defendants in Error.

# Supreme Court of the United States

## October Term, 1904

*No. 298*

Harold Petri, Carl Bopp and Victor Poels, Co-partners doing business under the name of Petri and Company,

*Plaintiffs in Error,*

vs.

F. E. Creelman Lumber Company, a corporation, and Frank E. Creelman,

*Defendants in Error.*

Error to the Circuit Court of the United States for the Northern District of Illinois, Northern Division

## MOTION BY DEFENDANTS IN ERROR TO DISMISS WRIT OF ERKOR AND BRIEF AND ARGUMENT IN SUPPORT THEREOF

Now at this time, to-wit: the 27th day of February, 1905, come the F. E. Creelman Lumber Company, a corporation, and Frank E. Creelman, defendants in error, by John M. Lansden, Angus Leek, David S. Lansden and M. Paul Noyes, their attorneys, and move the court to dismiss the writ of error to the circuit court, for the following reasons, to-wit:

1st. Because the judgment of the circuit court, dismiss-

ing the suit of the plaintiffs in error, for want of jurisdiction over the person of defendants in error, was rendered at the December term, 1902, of said circuit court, and no certificate of said question of jurisdiction was made by said circuit court until the December term, 1903, thereof, the said December term, 1902, and the July term, 1903, of said circuit court both having elapsed before said certificate of the question of jurisdiction was obtained.

2nd. Because the judgment, dismissing the suit of plaintiffs in error for want of jurisdiction over the person of defendants in error, was rendered in said circuit court by Hon. J. Otis Humphrey, Judge, and the certificate with reference to said question of jurisdiction, the bill of exceptions and the writ of error were all signed by another judge, Hon. Christian C. Kohlsaat.

JOHN M. LANSDEN,
ANGUS LEEK,
DAVID S. LANSDEN and
M. PAUL NOYES,
Attorneys for Defendants in Error.

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## STATEMENT.

The plaintiffs in error, who are aliens, on the 15th day of August, 1901, commenced an action of trespass on the case, in the Northern Division of the Northern District of Illinois, against the American Lumberman, a corporation, James E. Defebaugh and William B. Judson, residents and inhabitants of said Northern Division of said Northern District of Illinois, and the defendants in error, residents and inhabitants of the Southern District of Illinois. Two writs of summons were issued, one directed to the marshal of the North-

ern District of Illinois, and the other to the marshal of the Southern District of Illinois. The last named writ was served upon defendants in error at Cairo, within said Southern District of Illinois.

The defendants in error each filed a plea to the jurisdiction of the court, alleging that they were residents and inhabitants of said Southern District of Illinois and not of said Northern District and that the plaintiffs in error were aliens and residents and inhabitants of Antwerp, Belgium.

The plaintiffs in error filed a demurrer to each of the said pleas of the defendants in error and upon the hearing, the court overruled the demurrers and entered an order dismissing the cause as to the defendants in error, solely for want of jurisdiction over the person of defendants in error.

The judgment of the circuit court overruling said demurrers and dismissing said cause was rendered on the 16th day of June, 1903, at the December term, 1902, of said court. No action whatever was taken by plaintiffs in error at said December term, 1902, to have said question of jurisdiction certified to this court by said circuit court nor was anything done in this respect at the July term, 1903, of said circuit court.

The petition for the writ of error to this court was not presented until the 14th day of June, 1904, at the December term, 1903, of said circuit court, and said question of jurisdiction was for the first time certified to this court on that date.

The judgment of the circuit court was rendered by Hon. J. Otis Humphrey, Judge, who heard and decided the cause, and the certificate with reference to the question of jurisdiction, the bill of exceptions and the writ of error were all signed by another judge, Hon. Christian C. Kohlsaat, who was not present at the time of the hearing and decision.

## BRIEF.

1. The certificate of the question of jurisdiction not having been made by the circuit court during the December term, 1902, at which term said cause was dismissed for want of jurisdiction, the writ of error from this court should be dismissed for want of jurisdiction to entertain the same.

*Colvin v. City of Jacksonville et al.*, 158 U. S. 456-461.

*The Bayonne*, 159 U. S. 687-694.

2. The certificate of the question of jurisdiction should have been made, the bill of exceptions signed and the writ of error allowed by Hon. J. Otis Humphrey, Judge, who heard and decided the cause in the circuit court, and not by Hon. Christian C. Kohlsaat, Judge, who was not present at the hearing and decision. This court having decided that a bill of exceptions must be signed by the judge before whom the cause was tried, the same being a judicial act, by analogy it should be held that the granting of the certificate of the question of jurisdiction is also a judicial act which should be performed by the judge who heard and decided the cause.

*Malony v. Adsit*, 175 U. S. 281-291.

The statement in the certificate made by Judge Kohlsaat that Judge Humphrey, who heard the cause, resided at Springfield, Illinois, in the Southern District of Illinois, and that he was out of the territorial limits of the Northern District of Illinois at the time the certificate was granted, constitutes no excuse whatever for the failure of plaintiffs in error to have the certificate made by Judge Humphrey.

*Western Dredging & Improvement Co. v. Heldmaier*, 111 Fed. Rep. 128.

## ARGUMENT.

### I.

The judiciary act of March 3, 1891, provides that in cases where the jurisdiction of the court below is in issue, that question, and that alone, shall be certified to this court for decision.

By section 658 of the Revised Statutes of the United States it is provided that the terms of the circuit court for the Northern District of Illinois shall be held at Chicago on the first Monday in July and the third Monday in December. The act of March 2, 1887, 24 Stat. L. 442, divides the Northern District of Illinois into two divisions, a northern and southern, but section 3 of said act expressly provides that the terms of the circuit court for the Northern Division of said Northern District shall be held at the city of Chicago, as provided by said section 658 of the Revised Statutes.

The judgment in this case was rendered on the 16th day of June, 1903, at the said December term, 1902, of the circuit court. No attempt was made to procure a certificate of the question of jurisdiction during said December term, 1902, nor was any petition for a writ of error to this court presented during said term. The July term, 1903, of said circuit court also elapsed without any action on the part of plaintiffs in error with reference to procuring said certificate cate or filing said petition. No attempt whatever was made by plaintiffs in error to either obtain said certificate or present said petition until the 14th day of June, 1904, which was but a few days before the expiration of the December term, 1903, of the circuit court. The petition for the writ of error from this court was filed and said certificate was made, for the first time, on said 14th day of June, 1904, at said December term, 1903.

It will thus be seen that almost a year had elapsed after the expiration of the term at which the judgment was ren-

dered before the petition for the writ of error was presented and the certificate made.

Under this state of facts it is very clear that this writ of error should be dismissed for want of jurisdiction in this court to entertain the same.

In *Colvin v. City of Jacksonville et al.*, 158 U. S. 456-461, this court says:

"We are of opinion that where the jurisdiction of the court below is in issue and the case is certified to us for decision, the certificate must be granted during the term at which the judgment or decree is entered, by analogy to the statutory provisions on that subject which obtained in relation to certificates of division of opinion (Rev. Stat. Secs. 650, 651, 652, 693, 697; *Maynard v. Hecht*, 151 U. S. 324) and in view of the general rule as to the inability of the court to deal with matters of this sort after the expiration of the term. *Hickman v. Fort Scott*, 141 U. S. 415; *Morse v. Anderson*, 150 U. S. 156."

In *The Bayonne*, 159 U. S. 687-694, this court says:

"No question as to the constitutionality of the act of Congress arises on this appeal, but it is contended that the jurisdiction of the district court was in issue, and that therefore the appeal was properly taken directly to this court. But the judiciary act of March 3, 1891, provides that in cases where the jurisdiction of the court below is in issue, that question, and that alone, shall be certificed to this court for decision, the inquiry being limited to the question thus certified. *United States v. Jahn*, 155 U. S. 109-113."

"In *Maynard v. Hecht*, 151 U. S. 324, we held that a certificate from the court below of the question of jurisdiction to be decided was an absolute prerequisite to the exercise of jurisdiction here, and indicated by reference to the settled rules in relation to certificates of division of opinion in what manner we thought the certificate should be framed."

"In *Colvin v. Jacksonville,* 158 U. S. 456, it was decided that such certificate must be granted during the term at which the judgment or decree is entered."

"The district court of the United States for the Southern District of New York has monthly terms. Rev. Stat. Sec. 572. The decree here was entered December 21, and the appeal allowed December 31, 1892. On the 17th of the following January, during a new term of the court, the assignment of errors was directed to be filed *nunc pro tunc* as of December 31, 1892. If that assignment could be treated as a certificate, it came too late, and, as there is nothing in the record, prior to the expiration of the December term, to indicate any attempt or intention to file a certificate during that term, and there was no omission to enter anything which had actually been done at that term, the case did not come within the rule that permits an amendment of the record *nunc pro tunc. Hickman v. Fort Scott,* 141 U. S. 415-418; *Michigan Ins. Bank v. Eldred,* 143 U. S. 293-299. We do not, however, regard the assignment of errors, and the action of the court in directing it to be filed, as a compliance with the statutory provision and equivalent to the certificate required."

"The certificate of November 8, 1895, which gives a statement of the case and certifies certain specific questions as questions of jurisdiction, was also wholly unavailing at that date."

"Nor do we think that the allowance of the appeal can be treated as a certificate. The prayer for appeal did, indeed, state that the claimant appealed 'upon the ground that this court was without jurisdiction to make the said decree,' but it specified no question of jurisdiction, and asked 'that a transcript of the record and proceedings and papers upon which said final decree was made should be sent up,' as if the appeal were on the whole case. The entry of the district judge thereon was 'Appeal allowed.' This was wholly insufficient to subserve any other than the ostensible purpose. In *Re Lehigh Min. & Mfg. Co.,* 156 U. S. 322, the defendant

in an action of ejectment filed two pleas to the jurisdiction of the court, which pleas were sustained, and judgment thereon entered as follows: 'And for reasons in writing filed herewith, as part of this order, the court doth further consider that it has no jurisdiction of this case, and that the said action of ejectment be and the same is hereby dismissed for want of jurisdiction, but without prejudice to the parties to this suit.' A bill of exceptions was taken in which it was declared that the court 'held that the court did not have jurisdiction of this suit, and ordered the same to be dismissed, to which opinion and action of the court the plaintiff did then and there except.' The plaintiff then prayed for a writ of error from this court, which was allowed by an order under the hand of the judge, and entered on record, reciting the final judgment entered, 'dismissing the said case because the said court, in its opinion, did not have jurisdiction thereof,' and that plaintiff prayed for writ of error 'upon said question of jurisdiction,' and averring 'that said writ of error be allowed and awarded as prayed for.' Under these circumstances it was thought that the question was sufficiently certified."

"In *Shields v. Coleman*, 157 U. S. 168, a receiver appointed by a state court intervened in a suit in the circuit court of the United States for the recovery of possession of railroad property from the receiver of the circuit court, and, his application having been denied, he prayed an appeal to this court from the decree and interlocutory orders by which the circuit court assumed and asserted jurisdiction over the property. The circuit court allowed the appeal by an order stating: 'This appeal is granted solely upon the question of jurisdiction' and reserving to the court the right, which it subsequently exercised, of determining what portion of the proceedings should be incorporated into the record for the purpose of presenting that question. We entertained jurisdiction in that case also. But we are of opinion that this case cannot be brought within either of those last cited."

"The conclusion is that this appeal must be dismissed for

want of jurisdiction because of the lack of the proper certificate, a defect which cannot now be supplied. We have assumed that jurisdictional questions existed, within the meaning of section 5 of the act of March 3, 1891, though not properly raised, but we do not wish to be understood as intimating any opinion on that subject. Appeal dismissed."

Nothing whatever was done by plaintiffs in error in the case at bar, prior to the expiration of the term at which said judgment was entered, which in any manner indicated an intention on their part to have the question of jurisdiction certified. No bill of exceptions even was presented or filed until the 13th day of August, 1903, which was about six weeks after the expiration of the December Term, 1902, at which term the judgment was entered. As before stated, the petition for the writ of error, the assignment of errors and the certificate were not filed or made until June 14, 1904, and the order allowing the writ was not made until that same date. This was nearly one year after the expiration of the term at which said judgment was entered.

The cases from which we have above quoted show, we submit, beyond question, that the writ of error should be dismissed for want of jurisdiction in this court to entertain the same.

## II.

The record in this case shows that the bill of exceptions, the certificate of the question of jurisdiction and the order allowing the writ of error were all signed or made by Hon. Christian C. Kohlsaat, Judge, and said certificate shows upon its face that the cause was heard and decided by Hon. J. Otis Humphrey, Judge.

In *Malony v. Adsit*, 175 U. S. 281-291, this court expressly holds that a bill of exceptions must be signed by the judge who tried the case and that the court will not consideer a bill of exceptions signed by a judge who did not sit at the

trial and that what took place at the trial could only be judicially known by the judge who heard the cause.

Under this decision the bill of exceptions in this cause will not be considered by this court for any purpose.

By analogy we think it very clear that the certificate of the question of jurisdiction should have been granted by Judge Humphrey, who tried the case. We insist that the signing of such a certificate is a judicial act which can only be performed by the judge who rendered the judgment.

The attempt made by plaintiffs in error to excuse the failure to have said certificate made by Judge Humphrey can avail them nothing in this case. The only excuse offered is the statement made by Judge Kohlsaat in said certificate that Judge Humphrey, "who heard said cause, resides at Springfield, Illinois, in said Southern District of Illinois, and is now out of the territorial limits of said Northern District of Illinois." Plaintiffs in error waited until within two days of one year after the rendition of the judgment of the circuit court before they attempted to obtain said certificate of the question of jurisdiction and then give as a reason for their failure to have the certificate made by the judge who tried the cause, the fact that said judge resides in the Southern District of Illinois and was out of the territorial limits of the Northern District of Illinois at the time they made their application for the certificate.

By the act of June 5, 1900, 31 Stat. L. 270, passed after the decision in *Malony v. Adsit, supra,* it is provided that another judge may sign a bill of exceptions only in case of the death, sickness or other disability of the judge before whom the case was tried, provided the evidence is taken in stenographic notes or the judge is satisfied by other means that he can allow a true bill of exceptions. The presence of Judge Humphrey in the Southern District of Illinois and his absence from the Northern District of Illinois at the time plaintiffs in error asked for the certificate of the question of

jurisdiction does not, under the act of Congress last referred to, afford any excuse for the failure to have the certificate signed by Judge Humphrey.

*Western Dredging & Improvement Co. v. Heldmaier,*
111 Fed. Rep. 123.

We maintain, also, that the writ of error should have been allowed by Judge Humphrey and not by Judge Kohlsaat for the reasons we have already indicated in considering the question as to the necessity for the signing of the bill of exceptions and the certificate by Judge Humphrey.

We, therefore, respectfully submit that the writ of error in this case should be dismissed.

JOHN M. LANSDEN,
ANGUS LEEK,
DAVID S. LANSDEN and
M. PAUL NOYES,
Attorneys for Defendants in Error.

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## Supreme Court of the United States

### October Term, 1904

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JAMES H. McKENNEY,
Clerk.

NO. ~~298~~ 49.

Harold Petri, Carl Bopp and Victor Poels, Co-partners doing business under the name of Petri and Company,
*Plaintiffs in Error,*

vs.

F. E. Creelman Lumber Company, a corporation, and Frank E. Creelman,
*Defendants in Error.*

Error to the Circuit Court of the United States for the Northern District of Illinois, Northern Division

## MOTION TO DISMISS WRIT OF ERROR

## REPLY OF DEFENDANTS IN ERROR

JOHN M. LANSDEN,
ANGUS LEEK,
DAVID S. LANSDEN and
M. PAUL NOYES,
Attorneys for Defendants in Error.

# Supreme Court of the United States

## October Term, 1904

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*NO. 298*

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Harold Petri, Carl Bopp and Victor Poels, Co-partners doing business under the name of Petri and Company,

*Plaintiffs in Error,*

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Error to the Circuit Court of the United States for the Northern District of Illinois, Northern Division

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## MOTION TO DISMISS WRIT OF ERROR

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## REPLY OF DEFENDANTS IN ERROR

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Notwithstanding the fact that a printed copy of Rule 31 of this court, requiring all records, arguments and briefs to be printed on unglazed paper, together with the notification of the fact that this rule would be strictly enforced by the court, was pasted on the front cover of the transcript of the record sent by the clerk of this court to counsel for plaintiffs in error, counsel has deliberately violated this rule by printing his motion for leave to print additional portions of the

transcript of the record, his additional portions of the record and his brief and argument on glazed paper.

On the seventh day of September, 1904, counsel for plaintiffs in error served a notice on the defendants in error, stating that the only error he would rely on was that the circuit court erred in not sustaining the demurrers of the plaintiffs in error to the pleas interposed by the defendants in error to the jurisdiction of the circuit court and stating that the only portions of the transcript of the record necessary for the consideration of such question of jurisdiction were the petition for the writ of error and its assignment of error and the certificate of the circuit judge that the only question involved was one of jurisdiction and further stating that he would on the ninth day of September, 1904, file with the clerk of this court the specification of error relied on by him and the said designated portions which he deemed necessary for the consideration of the question of the jurisdiction of the circuit court.

On the ninth day of September, 1904, counsel for plaintiffs in error filed with the clerk of this court a statement that the only errors on which he would rely would be that the circuit court erred in not sustaining the demurrers of plaintiffs in error to the pleas interposed by the defendants in error to the jurisdiction of the circuit court and that the petition for the writ of error, the assignments of error and the certificate of the circuit judge that the only question involved was one of jurisdiction were the only parts of the record necessary to be considered in determining said question of jurisdiction.

After the expiration of ninety days from the time of the filing of said statement by the plaintiffs in error, with the clerk of this court, defendants in error, for the purpose of making a motion to dismiss the writ of error, deposited with the clerk of this court the necessary amount required to have the portions of the record designated by counsel for plaintiff in error printed and the clerk of this court thereupon caused

said designated portions of said record to be printed, in accordance with the ninth clause of Rule 10 of this court.

On the 27th day of February, 1905, being the day fixed by counsel for the defendants in error for the filing of the motion to dismiss the writ of error, counsel for the plaintiffs in error, in direct violation of the ninth clause of Rule 10 of this court, without having filed any statement with the clerk of this court of his desire to have the clerk print any additional portions of said record and without any notice whatever to counsel for the defendants in error of his desire to have additional portions of the record printed, deliberately took the matter out of the hands of the clerk of this court and personally assumed the right to have additional portions of said record printed under his own supervision and actually has had additional portions of said record printed under his own supervision and sends the additional portions of said record which he has privately caused to be printed, together with a printed motion to this court, asking this court to give him leave to print said additional portions of said record.

We respectfully submit to this court that these deliberate violations of Rules 31 and 10 of this court by counsel for plaintiffs in error should cause this court to refuse to consider any of the printed documents which have been filed by counsel for plaintiffs in error relative to the motion to dismiss the writ of error in this case.

But aside from these deliberate violations by counsel for the plaintiffs in error of said printed rules of this court, we think it very clear that the motion to dismiss the writ of error in this case should be sustained.

This court has uniformly held that where a case has been dismissed by a circuit or district court of the United States for want of jurisdiction, that the party desiring to have the action of the circuit or district court dismissing the case for want of jurisdiction reviewed by this court must during the term at which the case was dismissed cause the question of

jurisdiction to be certified to this court by the circuit or district court by which said cause was dismissed.

This certificate, whether in the form of a formal certificate or of an order allowing an appeal or writ of error, must be made by the trial court during the term at which the judgment or decree dismissing the case for want of jurisdiction is rendered.

Where no formal certificates of the question of jurisdiction is made by the trial court during the term at which the judgment or decree dismissing the case for want of jurisdiction is rendered, it must appear from the judgment or decree dismissing the cause for want of jurisdiction that the cause was dismissed for want of jurisdiction and it must also appear from the record of the judgment or decree made at that term that an appeal or writ of error was allowed by the trial court on said question of jurisdiction.

The obtaining from the trial court of a formal certificate of the question of jurisdiction or the making of an order by the trial court, showing that the only question decided was the question of jurisdiction and showing that an appeal or writ of error was allowed by the trial court from its decision dismissing the case for want of jurisdiction during the term at which the judgment or decree was rendered, is a condition precedent to the right to have the judgment or decree of the trial court dismissing the case for want of jurisdiction reviewed by this court.

Unless either a formal certificate of the question of jurisdiction is obtained from the trial court during the term at which the case is dismissed for want of jurisdiction or a judgment or decree is rendered by the trial court showing that the only question decided was a question of jurisdiction and showing that the trial court during that term allowed an appeal or writ of error from the judgment or decree dismissing the case for want of jurisdiction, the case is not in proper shape to be afterwards reviewed, either by appeal or writ of error, by this court.

We do not think that a case can be found wherein this court has decided that unless the case has been put in shape for appeal or writ of error during the term at which the judgment or decree dismissing the case for want of jurisdiction was rendered by the trial court, in one of the two methods we have mentioned, the judgment or decree dismissing the case for want of jurisdiction can be afterwards reviewed by this court either by appeal or writ of error.

In *Huntington v. Laidley*, 176 U. S. 676, the court says:

"In order to maintain the appellate jurisdiction of this court under this clause, the record must distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction. This may appear in either of two ways: by the terms of the decree appealed from, and of the order allowing the appeal; or by a separate certificate of the court below.

In *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 185 U. S. 285, the court says:

"This decree, after reciting 'that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, and that this court should not further exercise jurisdiction, it is therefore ordered and decreed that said suit be and the same is hereby dismissed for want of jurisdiction.' An appeal was taken from this decree, and the order allowing the appeal states that the appeal was allowed 'from the final order and decree dismissing said suit for want of jurisdiction. This is clearly a sufficient certificate of the circuit court that the jurisdiction of that court was in issue, and the only question to be considered by us relates to the jurisdiction of that court."

In the case from which we have just quoted the record made by the trial court during the term at which the case was dismissed by that court for want of jurisdiction affirmatively shows that the case was dismissed for want of juris-

diction and that an appeal was then allowed from said decree on the question of jurisdiction shown by the decree dismissing the case.

Counsel for appellant in that case perfected his appeal to the circuit court of appeals and that court dismissed his appeal for the reason that the appeal should have been perfected to this court.

On appeal by appellant to this court from the decision of the circuit court dismissing the case for want of jurisdiction, this court properly held that appellant having, during the term of the circuit court at which the decree was rendered dismissing the case for want of jurisdiction, put his case in shape for appeal by then obtaining an order allowing him an appeal on the question of jurisdiction, affirmatively shown by the decree dismissing said cause for want of jurisdiction, he could perfect his appeal to this court on the record made by the circuit court during the term at which the case was dismissed for want of jurisdiction allowing him an appeal on the definite question of jurisdiction which was affirmatively shown by the decree of that court dismissing the case for want of jurisdiction, notwithstanding the fact that his counsel had, in the first instance, erroneously perfected his appeal to the circuit court of appeals.

The case was decided upon the principle that the appellant having, during the term at which the decree dismissing the suit for want of jurisdiction was rendered, been allowed an appeal upon the question of jurisdiction which was affirmatively shown by the decree dismissing the case for want of jurisdiction, he was in a position to perfect his appeal on said question of jurisdiction to this court at any time within two years from the date of the rendition of said decree and that therefore the fact that his counsel, in the first instance, had erroneously perfected his appeal to the circuit court of appeals was a matter of no consequence whatever.

The order of the circuit court in that case simply allowed an appeal from the decree dismissing the case for want of

jurisdiction but did not specify the court to which the appeal should have been perfected. The mistake of perfecting the appeal to the circuit of appeals instead to this court, was simply a mistake of appellant's counsel. This court held that this error on the part of counsel could not prejudice appellant so as to prevent him from afterwards perfecting his appeal to this court.

In the case at bar, counsel for plaintiffs in error now says that his acts in procuring a bill of exceptions and in obtaining a certificate of the question of jurisdiction from the trial court were useless and unnecessary acts and seeks to base his right to have the question of jurisdiction reviewed by this court on the judgment rendered by the trial court. Counsel has abandoned almost everything he had done in the case prior to the time of the filing of the motion to dismiss the writ of error made by defendants in error. And yet, notwithstanding the fact that counsel contends that no bill of exceptions was necessary, he nevertheless prints, under his own personal supervision, a copy of the bill of exceptions and asks the court to consider it in connection with defendant's motion to dismiss.

It is claimed by counsel for plaintiffs in error that because counsel for defendants in error "O.-K."ed the bill of exceptions, they waived the fact that the same was not signed by the judge who tried the cause. When the draft of this bill of exceptions was presented to counsel for defendants in error it was, of course, not signed by any judge and counsel for defendants in error never had the remotest idea that the bill would be signed by Judge Kohlsaat and not by Judge Humphrey who tried the case.

Even if the court should consider the judgment rendered by the circuit court, dismissing the case for want of jurisdiction, which counsel for plaintiffs in error has printed under his own direction, said judgment fails to bring the case within the terms of any of the cases cited by counsel for plaintiffs in error. Said judgment wholly fails to show that any

order was made by the circuit court during the term at which the judgment was rendered allowing plaintiffs in error any writ of error to have said jurisdictional question reviewed. This judgment simply recites that plaintiffs in error made a motion for a writ of error to the circuit court of appeals and that a bond and bill of exceptions should be filed in sixty days. There is nothing said in this judgment of the court which in any manner allows plaintiffs in error to present the question of jurisdiction to this or any other court for review. The case is not sent by said judgment to this or any other court for the purpose of reviewing said question of jurisdiction.

Nor does this judgment of the circuit court come within the requirements of those decisions of this court which hold that the precise question of jurisdiction to be determined must appear from the judgment itself. This judgment does not present to the court the definite question of jurisdiction upon which the case was decided.

In *Shields v. Coleman*, 157 U. S. 168, cited by counsel for plaintiffs in error, this court says:

"It is sufficient if there is a plain declaration that the single matter which is by the record sent up for decision is a question of jurisdiction, and the precise question, clearly, fully and separately stated. No mere suggestion that the jurisdiction of the court was in issue will answer. This court will not of itself search nor follow counsel in their search of the record to ascertain whether the judgment of the trial court did or did not turn on some question of jurisdiction. But the record must affirmatively show that the trial court sends up for consideration a single definite question of jurisdiction."

In all of these cases cited by counsel for plaintiffs in error in which there was no formal certificate granted by the circuit court during the term at which the cause was dismissed for want of jurisdiction and in which it was held that the

judgment or decree was equivalent to a certificate, it appears from the record made at the term at which the judgment or decree was rendered that the case was decided solely upon the question of jurisdiction and that an order was made by the court at that term allowing a review of the case by appeal or writ of error on the question of jurisdiction alone. Nothing of this kind appears in the judgment rendered in the case at bar. Nor was there any petition for a writ of error or assignment of errors presented during the term at which said judgment was entered.

Counsel for plaintiffs in error has requested this court to reserve its decision upon the motion of defendants in error to dismiss until the hearing upon the merits, suggesting that it would save some labor for the court to do this. We submit that such a course would cause much additional and unnecessary labor to the court and to the parties and would also cause additional expense to the parties.

For the reasons which we have set forth herein and for those which have been presented in our former argument we again respectfully ask that the writ of error be dismissed.

JOHN M. LANSDEN,
ANGUS LEEK,
DAVID S. LANSDEN and
M. PAUL NOYES,
Attorneys for Defendants in Error.

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Clerk.

# Supreme Court of the United States

## October Term, 1904

NO. ~~298~~ 49.

Harold Petri, Carl Bopp and Victor Poels, Co-partners doing business under the name of Petri and Company,
*Plaintiffs in Error,*

vs.

F. E. Creelman Lumber Company, a corporation, and Frank E. Creelman,
*Defendants in Error.*

Error to the Circuit Court of the United States for the Northern District of Illinois, Northern Division

# Brief and Argument

## of Defendants in Error

JOHN M. LANSDEN,
ANGUS LEEK,
DAVID S. LANSDEN and
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*Attorneys for Defendants in Error.*

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# Brief and Argument
## of Defendants in Error

BRIEF.

The act of March 3, 1875, entitled "An Act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," (18 Stat. 470) is a general independent act intended to recast the jurisdiction of the circuit courts, and repealed Section 740 of the Revised Statutes which provided that if there were two or more defendants, residing in different dis-

tricts of a State, a suit not of a local nature might be brought in a district where one of the defendants resided and a duplicate writ issued to the marshal of any other district in which any defendant resided.

The jurisdiction of the circuit courts with reference to the particular district in which a defendant shall be sued, as determined by said Act of March 3, 1875, was further restricted by the Act of March 3, 1887, (24 Stat. 552,) as corrected by the Act of August 13, 1888, (25 Stat. 433).

The defendants in error are inhabitants of the Southern District of Illinois and were served with process in that district. The plaintiffs in error are aliens. The defendants in error, therefore, could not be sued in the Northern District of Illinois, in which district this suit was brought, although the other defendants were residents of said Northern District. The circuit court properly overruled the demurrers of plaintiffs in error to the pleas to the jurisdiction filed by defendants in error.

*McCormick Harvesting Machine Co. v. Walthers,* 134 U. S. 41; *Denton v. International Company of Mexico,* 36 Fed. Rep. 1.

*Smith v. Lyon,* 133 U. S. 315; *Greeley v. Lowe,* 155 U. S. 58; *Interior Construction and Improvement Co. v. Gibney et al.* 160 U. S. 217; *New Jersey Steel & Iron Co. v. Chormann et al.,* 105 Fed. Rep. 532; *Jenkins v. York Cliffs Imp. Co.,* 110 Fed. Rep. 807; *Freeman v. American Surety Co. of New York et al.,* 116 Fed. Rep. 549.

*French v. Spencer,* 21 How. 228; *Gibson v. United States* 194 U. S. 182; *M'Iver et al. v. Ragan et al.,* 2 Wheat.25; *Denn v. Reid,* 10 Pet. 524; *United States v. Goldenberg et al.,* 168 U. S. 95.

Potter's Dwarris on Statutes and Constitutions, page 221; *Hankins v. The People,* 106 Ill. 628; Cooley on Constitutional

Limitations, page 64; Sutherland on Statutory Construction, Sec. 328.

*Hamilton v. Rathbone,* 175 U. S. 414.

*Harwood v. Wentworth,* 162 U. S. 547; *Guthrie National Bank v. Guthrie,* 173 U. S. 528; *Waite v. Santa Cruz,* 184 U. S. 302; *Arms v. Ayer,* 192 Ill, 601.

*The Louisville Water Co. v. Clark,* 143 U. S. 1; *Rodgers v. United States,* 185 U. S. 83.

## ARGUMENT.

Prior to the time of the passage of the Act of March 3, 1875, recasting the jurisdiction of the circuit courts, section 739 of the Revised Statutes was the law in force determining in what particular district of a State an action should be brought. That section was as follows:

"Except in the cases provided in the next three sections, no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court; and except in the said cases and the cases provided for by the preceding section, no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process, in any other district than that of which he is an inhabitant or in which he is found at the time of serving the writ."

The cases excepted from the operation of said section 739 are contained in sections 738, 740, 741 and 742.

The exception provided for in section 738 relates only to a suit in equity to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought and provides for serving notice of the suit upon defendants not residents in the district in which the suit is pending. In other words this section relates only to proceedings in *rem* and in no manner attempts to bind a defendant personally.

Said section 740 is as follows:

"When a state contains more than one district, every suit not of a local nature, in the circuit or district courts thereof, against a single defendant, inhabitant of such state, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the state, it may be brought in either district and a duplicate writ may be

issued against the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall indorse thereon that it is a true copy of a writ sued out of the court of the proper district and such original and duplicate writs, when executed and returned into the office from which they are issued, shall constitute and be proceeded on as one suit, and upon any judgment or decree rendered therein execution may be issued, directed to the marshal of any district in the same state."

Section 741 relates to suits of a local nature where the defendant resides in a different district in the same State and provides for the issuance of process against him directed to the marshal of the district in which he resides.

Section 742 relates to suits of a local nature, at law or in equity, where the land or other subject matter of a fixed character lies partly in one district and partly in another, within the same State, and provides that suit may be brought in either district, and that the court in which it is brought shall have jurisdiction to hear and decide it and to cause *mesne* or final process to be issued and executed as fully as if said subject matter were wholly within the district for which the court is constituted.

The Act of March 3, 1875, entitled "An Act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," (18 Stat. 470) is a general, independent act, undertaking to recast the jurisdiction of the circuit courts, and repealed said section 740 of the Revised Statutes.

The latter part of the first section of said Act of 1875 is as follows:

"But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court.

And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding, except as hereinafter provided."

That portion of section 1 of the Act of 1875, from which we have just quoted, is a substantial re-enactment of section 739 of the Revised Statutes with the specific exceptions contained in said section 739 omitted.

Under the general exception contained near the end of the first section of said Act of 1875 the cases provided for in section 740 of the Revised Statutes are not saved or continued in force.

The substance of what is contained in said sections 738 and 742 is saved and continued in force by section 8 of said Act of 1875.

There is nothing whatever in the Act of 1875 which shows any disposition to save or continue in force the provisions of said sections 740 and 741.

On the contrary, the fact that the first section of the Act of 1875 is couched in general terms, providing that no suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found, at the time of serving such process or commencing such proceeding, except as is thereinafter provided, and in view of the further fact that the 8th section of said Act of 1875 is the only provision thereof which attempts to take any case out of the general words of the first section of said act, and that said 8th section does not include the cases provided for by section 740, but does include the cases provided for by sections 738 and 742, which are just before and after, respectively,

section 740, it seems very clear that the cases provided for by said section 740 were intentionally omitted from said Act of 1875.

Said Act of 1875 is a new independent act, not purporting to be an amendment of any previous act or acts. It undertakes to cover the whole subject with reference to the particular district in which civil suits must be commenced, and was, no doubt, intended as a substitute for the provisions contained in the Revised Statutes upon the same subject.

The jurisdiction of the circuit courts with reference to the district in which a defendant may be sued is still more restricted by the Act of March 3, 1887, (24 Stat. 552), as corrected by the Act of August, 13, 1888, (25 Stat. 433), said act being an amendment of the Act of March 3, 1875. So much of the first section of the Act of March 3, 1887, as is necessary for the consideration of the question now being discussed is as follows:

"But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Under the provisions of this act a defendant who does not reside in the district cannot be sued therein even though he should be found in said district, unless the plaintiff is a resident of that district.

Plaintiffs in error being aliens, that part of the section above quoted, which relates to bringing suits only in the dis-

trict of the residence of either the plaintiff or the defendant, has no application here. Such aliens can only sue the defendants in error in the district of which they are inhabitants.

*McCormick Harvesting Machine Co. v. Walthers*, 134 U. S. 41; *Denton v. International Company of Mexico*, 36 Fed. Rep. 1.

*In Smith v. Lyon*, 133 U. S. 315, the court says:

"The motion to dismiss for want of jurisdiction was sustained by the circuit court, and the soundness of that decision is the question which we are called upon to decide. The decision of it depends upon the proper construction of the first section of the Act of Congress approved March 3, 1887 (24 Stat. 552), as amended by the Act of August 13, 1888 (25 Stat. 433). That statute professes to be an Act to amend the Act of March 3, 1875, and its object is 'to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes'. The first section of the Act confers upon the circuit courts of the United States original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds the sum of $2,000, and arising under the Constitution or laws of the United States or treaties made or which shall be made under their authority. It then proceeds to establish a jurisdiction in reference to the parties to the suit. These are controversies in which the United States are plaintiffs, or in which there shall be a controversy between citizens of different States, with a like limitation upon the amount in dispute, and other controversies between parties which are described in the Statute. The first clause of the Act describes the jurisdiction common to all the circuit courts of the United States, as regards the subject matter of the suit, and as regards the character of the parties who by reason of such character may, either as plaintiffs or defendants, sustain suits in circuit courts. But the next sentence in the same section undertakes to

define the jurisdiction of each one of the several circuit courts of the United States with reference to its territorial limits, and this clause declares 'that no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.'

"In the case before us, one of the plaintiffs is a citizen of the State where the suit is brought, namely, the State of Missouri, and the defendant is a citizen of the State of Texas. But one of the plaintiffs is a citizen of the State of Arkansas. The suit, so far as he is concerned, is not brought in the State of which he is a citizen. Neither as plaintiff nor as defendant is he a citizen of the district where the suit is brought. The argument in support of the error assigned is that it is sufficient if the suit is brought in a State where one of the defendants or one of the plaintiffs is a citizen. This would be true if there was but one plaintiff or one defendant. But the Statute makes no provision in terms for the case of two defendants or two plaintiffs who are citizens of different States. In the present case, there being two plaintiffs, citizens of different States, there does not seem to be in the language of the Statute any provision that both plaintiffs may unite in one suit in a State of which either of them is a citizen." * * * *

"This Statute, conferring and defining the jurisdiction of circuit courts of the United States has been re-enacted and recast several times since the original decision of *Strawbridge v Curtiss*.. The first of these was the general revision of the statutes of the United States, passed in 1874, in which the language of the Statute of 1789 is supposed to be reproduced accurately. But an Act of March 3, 1875 (18 Stat., 470), under-

took to recast the jurisdiction of the circuit courts, and its first section, the important one in this connection, contains the same language in regard to the jurisdiction of the court in controversies between citizens of different States, and also the provision that no civil suit shall be brought in either of said courts by any original process or proceeding in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving process. The Statute remained in this condition until the Act of 1887, which we are now considering, as amended by the Act of August 13, 1888, (25 Stat. 433)."
* * * *

"The Statute which we are now construing leaves out the provision that if the party has the diverse citizenship required by the Statute, he may be sued in any district where he may be found at the time of the service of process. The omission of these words, and the increase of the amount in controversy necessary to the jurisdiction of the circuit court, and the repeal of so much of the former Act as allowed plaintiff to remove causes from the State courts to those of the United States, and many other features of the new statute, show the purpose of the Legislature to restrict rather than to enlarge the jurisdiction of the circuit courts, while, at the same time, a suit is permitted to be brought in any district where either plaintiff or defendant resides." * * * *

"It is not readily to be conceived that the Congress of the United States, in a Statute mainly designed for the purpose of restricting the jurisdiction of the circuit courts of the United States, using language which has been construed in a uniform manner for over ninety years by this court, intended that that language should be given a construction which would enlarge the jurisdiction of those courts and which would be directly contrary to that heretofore placed upon it by this court."

In *Greeley v. Lowe*, 155 U. S. 58, the court says:
"But, by the Act of March 3, 1875, section 1, (18 Stat.

at L. 472), a slight change was made in the previous phraseology to the effect that 'no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceedings, except as hereinafter provided.' This exception is contained in section 8 of the same Act, which deals with the class of cases mentioned in Revised Statutes, section 738, and provides for publication 'in any suit * * * * to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought,' with a further proviso that 'said adjudication shall, as regards such absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein within such district.' As no exception was made in that Act of the cases provided for by sections 740, 741 and 742 it is at least open to some doubt as to whether suits will lie against non-resident defendants under those sections."

In *Interior Construction and Improvement Co. v. Gibney et al.*, 160 U. S. 217, the court says:

"The record shows that the only matter tried and decided in the circuit court was a demurrer to the plea to the jurisdiction, and the petition upon which the writ of error was allowed asked only for the review of the judgment that the court had no jurisdiction of the action." * * * *

"The Act of March 3, 1887, as corrected by the Act of August 13, 1888, confers upon the circuit courts of the United States original jurisdiction of all civil actions at common law or in equity between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000; and provides that 'where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the dis-

trict of the residence of either the plaintiff or the defendant.' The circuit courts of the United States are thus vested with general jurisdiction of civil actions, involving the requisite pecuniary value, between citizens of different States. Diversity of citizenship is a condition of jurisdiction, and when that does not appear upon the record the court, of its own motion, will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between the parties, but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege which the defendant may insist upon, or may waive, at his election; and the defendant's right to object that an action within the general jurisdiction of the court is brought in the wrong district is waived by entering a general appearance, without taking the objection." * * *

In *Smith v. Lyon*, 133 U. S. 315, this court held that the provision of the Act of 1888, as to the district in which a suit between citizens of different States should be brought, required such a suit in which there was more than one plaintiff or more than one defendant, to be brought in the district in which all the plaintiffs or all the defendants were inhabitants."

"When there are several defendants, some of whom are and some of whom are not inhabitants of the district in which the suit is brought, the question whether those defendants who are inhabitants of the district may take the objection, if the non-resident defendants have not appeared in the suit, has never been decided by this court. Strong reasons might be given for holding that, especially where, as in this case, an action is brought against the principals and sureties on a bond, and one of the principals is a non-resident and does not appear, the defendants who do come in may object at the proper stage of the proceedings, to being compelled to answer the suit."

"But in the present case it is unnecessary to decide that question, because one of the principals and both sureties, being

all of the defendants who pleaded to the jurisdiction, had entered a general appearance long before they took the objection that the sureties were citizens of another district. Defendants who have appeared generally in the action cannot even object that they were themselves inhabitants of another district, and of course, cannot object that others of the defendants were such."

In the case from which we have just quoted this court clearly announces the doctrine that a defendant who is not an inhabitant of the district in which a suit is brought, when sued with another defendant who is an inhabitant of said district, may successfully plead to the jurisdiction of the court and have the suit abated as to him. This case expressly recognizes that *Smith v. Lyon*, 133 U. S. 315, so decides. Indeed, this court strongly intimates that where several defendants are sued, some of whom are inhabitants of the district in which the suit is brought and some of whom are not, the resident defendants may successfully plead to the jurisdiction of the court, if the non-resident defendants have not appeared in the action.

In *New Jersey Steel and Iron Co. v. Chormann et al.*, 105 Fed. Rep. 532, the court says:

"The situation in this district touching the questions raised in the present application is unsatisfactory, and some final disposition of the subject is desirable. Several years ago the question was first presented to the writer. Upon an examination of the statutes he was convinced that section 740 was repealed by the provisions of the acts of 1887 and 1888. These acts expressly repealed statutes inconsistent with their provisions, and it was difficult to understand why a provision prohibiting the bringing of an action against an individual in any district except that of his residence was not inconsistent with a provision that he might be sued in some district not of his residence, provided it was in the same State. The care with which Congress expressly reserved from the operation of the repealing clause sections 641 and others seemed to indicate that that

body understood quite well what was the meaning of the language it employed, and intended that it should be interpreted according to its grammatical construction. No opinion, however, was written at the time, although the clerk was instructed thereafter not to issue duplicate subpoenas under the provisions of section 740. Subsequently the same question arose in this district before Judge Coxe, in *Goddard v. Mailler*, 80 Fed. 422. There being no opinion in the earlier case, Judge Coxe was not advised of the former decision, and considered the point as one of novel impression in this district. He followed *Bank v. Harrison*, 8 Fed. 721, and *East Tennessee, V. & G. R. R. v. Atlanta & F. R. Co.*, 49 Fed. 608, and held that section 740 was still in force. An examination of the careful opinions filed in the three cases last cited has failed to change the writer's impression as to the proper construction of the acts of 1887 and 1888. Under these circumstances, the best disposition to make of the present application seems to be to instruct the clerk to issue a duplicate subpoena. When it is served, the defendant Chormann may appear specially for the purpose of contending that the court in the Southern District of New York has no jurisdiction of him, and raise the point either by plea or in some other appropriate way. From the decision rendered upon such plea, an appeal will lie to the appropriate court of review, and the question thus be finally disposed of."

In *Jenkins v. York Cliffs Imp. Co. et al.*, 110 Fed. Rep. 807, the court says:

"The question, therefore, before us is as follows: Inasmuch as the suit was brought in a district in which the complainant is not a resident, must all of the respondents be residents of that district? So far as the present jurisdictional statutes are concerned it was settled authoritatively in *Smith v. Lyon*, 133 U. S. 315, that the circuit court has no jurisdiction on the ground of diverse citizenship where there are divers plaintiffs who are citizens of, and residents in different States and districts, if the defendant is also a citizen of, and resident in a third State and district, though the action is brought in a

district in which one of the plaintiffs resides. This case was restated in *Greeley v. Lowe*, 155 U. S. 58. The supreme court has not passed on a state of the record such as we have here, in view of the existing jurisdictional statutes; but the line of reasoning in *Smith v. Lyon* is as applicable here as to a suit where there are several plaintiffs residing in different districts. We understand *Phosphate Co. v. Brown*, 20 C. C. A. 428, 74 Fed. 321, decided by the circuit court of appeals for the Fourth circuit, is directly in point on the case before us; and if so, it would, in view of the effect given in this circuit to the decisions of the circuit court of appeals in these circuits conclude us. Independently of that case, however, we think the line of reasoning of the supreme court in the opinions to which we have referred compels us to sustain the plea."

In *Freeman v. American Surety Co. of New York et al.*, 116 Fed. Rep. 549, the court says:

"By the provisions of the first section of the amendatory act of August 13, 1888, (25 Stat. 433), it is declared that 'where jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.' In support of the jurisdiction of this court it is suggested that the American Surety Company, having an office for the transaction of business at Cedar Rapids, which is within this district, and in view of the provisions of the act of Congress, approved August 13, 1888, (28 Stat. 279), can be deemed to be a resident of this district; thus meeting the requirements of section 1 of the Act of 1888. Granting for the moment that the residence within the district might be assumed with respect to the Surety Company, this would not confer jurisdiction upon this court, for the reason that the other defendants are not shown to be residents of the district. In the case of *Smith v. Lyon*, 133 U. S. 315, it was held that, to maintain the territorial jurisdiction of a federal court, under the Act of 1888, in cases where the federal cognizance was based upon the diversity of citizenship, and in which there was more than one party plain-

tiff, it must be shown that all resided within the district in which jurisdiction was invoked. Of necessity, the same rule must apply when the jurisdiction is based upon the place of residence of the defendants. If there are more than one defendant, all must reside within the district wherein the suit is brought; and therefore, if it were true that the Surety Company was suable in this district, that would not enable the court to take jurisdiction over the other defendants, nor of the suit as a whole."

We respectfully insist that the foregoing cases are direct authorities for the position that section 740 of the Revised Statutes has been repealed by the Act of March 3, 1875, as amended by the Act of March 3, 1887, which was corrected by the Act of August 13, 1888, and that, consequently, a defendant who is not an inhabitant of the district in which the suit is brought cannot be rightfully sued in that district, although he is joined in such suit with a defendant who is an inhabitant of such district.

Not a case decided by this court has been cited by counsel for plaintiffs in error which in any manner intimates that said section 740 is still in force.

But if the question here involved were one of novel impression in this court, it seems very clear that a proper construction of said Acts of 1875, 1887 and 1888 would necessarily lead to a decision that said section 740 has been repealed.

The first section of said Act of 1875 provides that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding, *except as hereinafter provided.*" None of the exceptions provided for by this act attempt to save the cases covered by said section 740.

Section 10 of this act expressly provides that "all acts and parts of acts in conflict with the provisions of this act are hereby repealed."

To hold that said section 740 is still in force would be to add, by construction, an exception which is not provided for by said Act of 1875.

In *French v. Spencer*, 21 How. 228, this court says:

The Act of March 5, 1816, has no reference to, or necessary connection with any other bounty land act; it is plain on its face and single in its purpose. And, then, what is the rule? One that cannot be departed from without assuming on part of the judicial tribunals legislative power. It is, that where the Legislature makes a plain provision without making any exception, the courts can make none."

In *Gibson v. United States*, 194 U. S. 182, this court says:

"Where it is the intention of the statute to make a distinction or exception in allowance, that exception is expressly stated. The subject-mater of the later act provides for allowances to such officers, and it is to be the same as is now provided by law for Army officers of corresponding rank. Had Congress intended that such allowances as theretofore given should be continued, or to reserve the right to commutation as to the ration, it would have been very easy to have inserted apt words which would have rendered effectual this purpose. But the terms of the law undertaking to revise former laws upon the subject make no such reservation as is contended for, and we think we are not at liberty to add to the statute by inserting it."

"It is true that repeals by implication are not favored, but where the same subject-matter is covered by two acts which cannot be harmonized with a view to giving effect to the provisions of each, to the extent of the repugnancy between them the later act will prevail, particularly in cases where it is apparent that the later act was intended as a substitute for the earlier one. *District of Columbia v. Hutton*, 143 U. S. 18."

"It is admitted that a change in the compensation of naval officers was made by the enactment of the new law, and, while section 13 provided that such officers should not be reduced in pay, there is no provision retaining the allowance of the former act. Moreover, section 26 of the naval personnel act provides that all acts and parts of acts, so far as they conflict with its provisions, shall be repealed. For the reasons stated we think the allowance of the previous statute cannot stand consistently with the express provision upon the same subject of the later act."

In *M'Iver et al. v. Ragan et al.*, 2 Wheat 25, the court says:

"If this difficulty be produced by the legislative power, the same power might provide a remedy; but courts cannot on that account, insert in the Statute of Limitations an exception which the statute does not contain."

In *Denn v. Reid*, 10 Pet. 524, the court says:

"Where the language of the act is not clear, and is of doubtful construction, a court may well look at every part of the statute; at its title and the mischief intended to be remedied in carrying it into effect. But it is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions."

In *United States v. Goldenberg et al.*, 168 U. S. 95, the court says:

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language he has used. He is presumed to know the meaning of words and the rules of grammar. Courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise where there are cogent reasons for believing that the

letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specially provided for, justify any judicial addition to the language of the statute."

The fact that the persons or cases covered by said section 740 are not included in the exceptions provided for by the said 8th section of said Act of 1875, necessarily shows that said persons or cases provided for by section 740 are included within the general words of the first section of said act of 1875.

This view is also strengthened, if it is possible to strengthen it, by the fact that the 8th section of said Act of 1875 excepts from the operation of the general words of the first section of said act persons or cases which are provided for by sections 738 and 742 of the Revised Statutes, which sections appear almost immediately before and after said section 740.

The Act of 1887, as corrected in 1888, is even more restrictive of the jurisdiction of the district and circuit courts of the United States than was said Act of 1875.

The latter part of the first section of said Act of 1887 is as follows:

"But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

It will be observed that said Act of 1887 omits from its provisions that part of section one of the Act of 1875 which allowed a person to be sued in the district in which he was found at the time of serving process on him or commencing the

proceeding against him, although neither he nor the plaintiff was an inhabitant of that district. In lieu thereof, it provides that where the jurisdiction is founded only on the fact that the action is between citizens of different States the suit shall be brought only in the district of the residence of either the plaintiff or the defendant, thus preventing the defendant from being sued except in the district of which the plaintiff was an inhabitant, and even when sued in the last named district the defendant must be found in that district.

The first section of said Act of 1887, which is the enacting clause of the act conferring original jurisdiction on circuit courts of the United States, also omits from its provisions the excepting clause found near the end of the first section of said Act of 1875.

The first section of said Act of 1887 provides in unqualified terms that no person shall be sued in any other district than that of which he is an inhabitant, unless he is found in the district of the residence of the plaintiff in a case where the jurisdiction is founded only on the fact that the action is between citizens of different States.

The fifth section of said Act of 1887 constitutes a saving clause and is the only saving clause to be found in said act so far as the first section of the act is concerned.

Said fifth section is as follows: "That nothing in this act shall be held, deemed or construed to repeal or affect any jurisdiction or right mentioned either in section 641, or in 642 or in 643, or in 722, or in Title 24 of the Revised Statutes of the United States, or mentioned in section 8 of the Act of Congress of which this act is an amendment, or in the Act of Congress approved March first, eighteen hundred and seventy-five, entitled 'An Act to protect all citizens in their civil and legal rights.'"

Said sections 641 and 642 of the Revised Statutes, which

are saved by the 5th section of said Act of 1887, are sections providing for the removal of causes from State courts to Federal courts in civil rights cases, and said section 643 is a section providing for the removal of causes from State courts to Federal courts in cases where suits or criminal prosecutions are commenced in a State court against revenue officers of the United States or against any person assisting such officers in enforcing the revenue laws of the United States or against any person holding property or estate under such officers which affects the validity of any such revenue laws, or against any officer of the United States or any other person for any act done by him under the election registration laws of the United States.

Said section 722 is a section providing for the commencement of civil suits and criminal prosecutions in civil rights cases in the circuit and district courts of the United States providing that such suits and prosecutions shall be enforced in conformity with the laws of the United States when such laws are applicable, and when such laws are not applicable, then in conformity with the common law, etc.

Said Title 24 of the Revised Statutes is a title relating exclusively to civil rights cases.

Said 8th section of said Act of March 3, 1875, is, as we have already seen, in discussing said act, a section saving the cases provided for in sections 738 and 742 from the operation of the general words contained in the first section of said Act of 1875.

The Act of March 1, 1875, which is referred to in the last paragraph of the fifth section of said Act of 1887, is an act for the protection of persons in their civil rights, with reference to the equal enjoyment, etc., of inns, public conveyances, theaters and other places of public amusement, and the third section of this act expressly provides that the district and circuit courts

of the United States shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses against, and violations of, the provisions of this act; and that actions for the penalty given by the preceding sections of said act may be prosecuted in the territorial, district or circuit courts of the United States in any district where the defendant may be found, without regard to the other party.

There is nothing whatever in said Act of 1887 which saves, or attempts to save, the cases provided for by said section 740 of the Revised Statutes.

The fact that the fifth section of said Act of 1887 expressly saves from the operation of the Act four distinct sections, and one whole Title of the Revised Statutes, and the eighth section of said Act of March 3, 1875, which was a substantial re-enactment of sections 738 and 742, and the civil rights act passed on March 1st, 1875, which expressly allows the defendant therein to be sued in the district or circuit court of the United States in any district in which he may be found, shows that Congress clearly understod that said Act of 1887 was a very comprehensive act, and was intended to be a substitute for all similar previous legislation on the same subjects.

Congress in and by said fifth section of said Act of 1887, by providing that said 8th section of said Act of March 3, 1875, and said civil rights Act of March 1, 1875, should not be repealed or affected by said Act of 1887, clearly shows that it understood that said laws would be repealed by said Act of 1887 unless they were expressly saved from the operation thereof.

In this connection nothing could be more pertinent to the question under consideration than the language of Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheaton 191, which is as follows:

"It is a rule of construction, acknowledged by all, that the

exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power that which the words of the grant could not comprehend."

Equally pertinent are the observations of the same able jurist in *Brown v. State of Maryland*, 12 Wheaton 438, as follows:

"If it be a rule of interpretation, to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the law giver, the thing excepted would be within the general clause had the exception not been made, we know no reason why this general rule should not be as applicable to the constitution as to other instruments."

In *Ryan et al. v. Carter et al.*, 93 U. S. 78, the court says:

"The general rule of law is, that a proviso carves special exceptions out of the body of the act; and those who set up any such exception must establish it, as being within the words as well as the reason thereof."

In *Louisville Water Co. v. Clark*, 143 U. S. 1, the court says:

"It is clear that the exemption allowed by the Act of 1882 was withdrawn by the General Revenue Statute of 1886. While the former Act exempted the Water Company from taxation of whatever character, State, municipal, or special, the latter subjected to taxation *all* property, real and personal, within the State, unless expressly exempted by its provisions. The Act of 1886 not only failed to exempt the property of the Water Company from taxation, but expressly required, as did the general statutes in force prior to 1882 (Art. 12 Sec. 4, Chap. 92), that every water company doing business within the State should make, annually, a full and complete statement, under oath, of all its property, including its surplus or contingent fund, cash, stocks, bonds, and other securities. And that there might be no possible doubt as to the scope of that Act, the chapter of the general statutes relating to taxation, and other stat-

utes specially named by their titles, relating to revenue, and *all other* acts and parts of acts, 'general *and special*,' inconsistent or not in conformity with its provisions, were expressly repealed by the Act of 1886. The sweeping character of this repeal is further shown by the specification of certain laws that were excepted from the repeal, which specification did not include the Act of 1882. The latter Act is special in its exemption of a particular company from taxation. It was, therefore, inconsistent with the Revenue Act of 1886, which embraced, in terms, all property, real and personal, within the State, not expressly exempted by its provisions from taxation. There is thus a positive repugnancy between the special and the general Act. This being so, the repealing clause included the special Act of 1882, and, therefore, subjected the property of the Water Company to taxation as provided in the Revenue Act of 1886. In so holding, we do no violence to the established rule that repeals by implication are not favored for, under the repeal of all special acts not in conformity with the general statute, the Act of 1882, not being expressly excepted from such repeal, cannot stand with that of 1886."

In Potter's Dwarris on Statutes and Constitutions, on page 221, the author says:

"Where a general act of parliament confers immunities which expressly exempt certain persons from the effect and operation of its provisions, it excludes all exemptions to which the subject might have been before entitled at common law. The introduction of the exemption is necessarily exclusive of all other independent, extrinsic exceptions. The maxim is clear, *'expressum facit cessare tacitum.'* Affirmative specification excludes implication."

In *Hankins v. The People,* 106 Ill. 628, it is held that the exclusion of one subject or thing in a statute is the inclusion of all other things.

In Cooley on Constitutional Limitations, page 64, the author says:

"Akin to this is the rule that 'where a power is granted in

general terms, the power is to be construed as coextensive with the terms, unless some clear restriction upon it is deducible (expressly or by implication) from the context."

In Sutherland on Statutory Construction, Sec. 328 the author says:

"An express exception, exemption or saving excludes others. Where a general rule has been established by statute with exceptions the court will not curtail the former nor add to the latter by implication. Exceptions strengthen the force of the general law and enumeration weakens it as to things not expressed."

The Act of March 3, 1875, as amended by the Act of March 3, 1887, is a general, independent act, intended to recast the jurisdiction of the circuit courts with reference to the particular district in which defendants may be sued. It is plain and unambiguous upon its face. It provides that no person shall be sued in any other district than that whereof he is an inhabitant. The exceptions to this general rule are set forth in the act itself, none of which include the cases provided for by section 740 of the Revised Statutes. If the acts of 1875 and 1887 were original acts, it is very clear that the fact that one defendant resides in the district in which the suit is brought, would not justify the sending of a duplicate subpoena into another district, in the same State, for service upon another defendant not a resident of the district in which the suit is brought. This being the case, section 740 of the Revised Statutes cannot be resorted to for the purpose of limiting, in any manner, the comprehensive provisions of the Acts of 1875 and 1887.

*In Hamilton v. Rathbone*, 175 U. S. 414, the court says:

"The decisive question then is whether section 728 is to be construed as an independent act, or whether the plaintiff is at liberty, by referring to the prior act from which it is taken, to show that it was the intention of Congress to limit it to the cases named in such prior act. The general rule is perfectly

well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look to prior and contemporaneous acts, the reason which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it." * * *

"Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to solve, but not to create, an ambiguity. If section 728 were an original act, there would be no room for construction. It is only by calling in the aid of a prior act that it becomes possible to throw a doubt upon its proper interpretation. The word 'property', used in section 728, includes every right and interest which a person has in lands and chattles, and is broad enough to include everything which one person may own and transfer to another. The main object of the revision was to incorporate all of the existing statutes in a single volume, that a person desiring to know the written law upon any subject might learn it by an examination of that volume, without the necessity of referring to prior statutes upon the subject. If the language of the revision be plain upon its face, the person examining it ought to be able to rely upon it. If it be but another volume added to the prior Statutes at Large, the main object of the revision is lost, and no one can be certain of the law without an examination of all previous statutes upon the same subject."

Counsel for plaintiffs in error claims that section 740 of the Revised Statutes is a special act and not a general law and, therefore, that it is not repealed by the Acts of 1875 and 1877,

insisting that a general act does not repeal a prior special act, unless the provisions of the special act are inconsistent with those of the later general act.

Said section 740 applied to every State in the Union which contained more than one district. The fact that there were some States which did not have more than one district within their borders did not make said section 740 any the less general. In no sense of the term was that section a special or local law.

*Harwood v. Wentworth*, 162 U. S. 547; *Guthrie National Bank v. Guthrie*, 173 U. S. 528: *Waite v. Santa Cruz*, 184 U. S. 302; *Arms v. Ayer*, 192 Ill. 601.

But even if it could be said that section 740 was a special or local act, its provisions are so inconsistent with said Acts of 1875 and 1887, with reference to the particular district in which a defendant may be rightfully sued, that the latter Acts clearly operated to repeal said section 740.

*The Louisville Water Co. v. Clark*, 143 U. S. 1; *Rodgers v. United States*, 185 U. S. 83.

We have already shown that the provisions of section 740 are manifestly and irreconcilably in conflict with said Acts of 1875 and 1887.

It is claimed by counsel for plaintiffs in error that the Act of March 2, 1887, (24 Stat. 442,) gave plaintiffs the right to commence their suit in the Northern District of Illinois against an inhabitant thereof and to send a duplicate subpoena into the Southern District of Illinois for service upon defendants in error, who were inhabitants of the latter district. This act, by its first section, takes three counties in the State of Illinois out of the Southern District of that State and makes them a part of the Northern District of the State. It then divides the Northern District into two divisions, to be known as the Northern and Southern Divisions. All of the remaining provis-

ions of this act relate to suits which are commenced against residents of the Northern District of Illinois or persons found therein. It states that action shall be commenced in that division of the Northern District in which the defendant or defendants reside, with a proviso that, if some of the defendants reside in the Northern Division and some in the Southern Division, that a suit may be brought in either of said divisions. It further provides that when the defendant is a non-resident of the district, action may be brought in either division of said district wherein the defendant may be found.

This act does not pretend to authorize the sending of a duplicate subpoena out of the Northern District of Illinois into the Southern District of Illinois. Its provisions are confined exclusively to suits against residents of said Northern District of Illinois and against persons who are found in the Northern District. This act has no application whatever to the question involved in this suit.

In conclusion, we desire to say that the action brought by plaintiffs in error against defendants in error is an action on the case for libel. It is, therefore, an action for a tort and, being such, it is a joint and several action. There was nothing whatever, therefore, to have prevented the plaintiffs from suing the defendants who were inhabitants of the Northern District of Illinois in that district and, also, from suing defendants in error in the Southern District of that State, of which latter district they were inhabitants.

We submit that the judgment of the circuit court, overruling the demurrers of plaintiffs in error to the pleas filed by defendants in error to the jurisdiction of the court and dismissing the action as to defendants in error, was correct and we respectfully ask this court to affirm the same.

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*Attorneys for Defendants in Error.*

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# Supreme Court of the United States
## October Term, 1905

*No. 49*

Harold Petri, Carl Bopp and Victor Poels, Co-partners doing business under the name of Petri and Company,
*Plaintiffs in Error*,

v.

F. E. Creelman Lumber Company, a corporation, and Frank E. Creelman,
*Defendants in Error.*

Error to the Circuit Court of the United States for the Northern District of Illinois, Northern Division

## Petition of Defendants in Error for a Rehearing

JOHN M. LANSDEN,
ANGUS LEEK,
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M. PAUL NOYES,
*Attorneys for Defendants in Error.*

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## Petition of Defendants in Error for a Rehearing

To the Honorable the Supreme Court of the United States:

Your petitioners, the defendants in error in the above entitled cause, respectfully ask this honorable court to grant them a rehearing in said cause and show to the court here the following reasons why a rehearing should be granted, to-wit:

I.

The court, in its opinion, has overlooked the well set-

tled distinction between the right to bring a suit in a particular judicial district and the power to send process of summons from the court in that district into another judicial district for service on a defendant residing in the latter district.

The effect of the opinion in this case will be to revolutionize the holdings of this court concerning the practice under the general act of March 3, 1887, with reference to the district in which a defendant shall be sued.

The court assumes, for the sake of the argument, that section 740 of the Revised Statutes has been repealed by the judiciary acts of March 3, 1875, (18 Stat. 470), or of March 3, 1887, (24 Stat. 552), as corrected by the act of August 13, 1888, (25 Stat. 432), and sustains the jurisdiction of the circuit court on the special act of March 2, 1887, (24 Stat. 442), concerning the State of Illinois, the 4th section of which is as follows:

"That all civil suits not of a local nature, and criminal prosecutions, must be brought in the division of the said Northern District of Illinois where the defendant or defendants reside or the offense is committed; but if there are two or more defendants in civil suits residing in the different divisions or districts the action may be brought in either in which either of the defendants may reside. When the defendant is a non-resident of the district action may be brought in either division of said district wherein the defendant may be found."

The court has held that the words "divisions or districts" referred as well to the Southern as to the Northern District of Illinois and that this act of March 2, 1887, was not repealed by the general act of March 3, 1887.

It will be observed that this special act does not attempt to provide for the issuing of a writ of summons from the court held in the Northern District of Illinois into the Southern District of Illinois for service on a defendant residing in the latter district. The act simply provides that where

there are two or more defendants residing in the different districts of Illinois that the action may be brought in either district but it does not authorize the sending of process from one district to the other.

The act of May 4, 1858, (11 Stat. 272), provides that if there be two or more defendants, residing in different districts in the same state, the plaintiff may sue in either district and issue a duplicate writ against the defendants, directed to the marshal of any other district within the state in which any of the defendants reside; and that on such duplicate writ the clerk issuing the same shall endorse that it is a true copy of a writ sued out of the court of the proper district; and that such original and duplicate writs, so issued, shall, when executed and returned into the office from which they issue, constitute one suit and be proceeded in accordingly and that upon any judgment rendered in a suit so brought process of execution may be issued directed to the marshal of any district in the same state. This provision was afterwards re-enacted as section 740 of the Revised Statutes.

An examination of all of the acts of Congress passed both before and after the act of May 4, 1858, discloses the fact that every special act on this subject, with two exceptions, expressly authorized the sending of a duplicate writ out of the district in which the suit was brought to the other district in the state. The only exceptions are the act of March 3, 1881, (21 Stat. 507), as to Louisiana, and the act of March 2, 1887, (24 Stat. 442), as to Illinois, the latter being the one involved in this case.

The federal courts have uniformly decided that the jurisdiction of a circuit court is confined to the particular district for which the court is constituted and that its process cannot be sent into any other district either in the same state or other states without special legislative authority from Congress therefor.

In *ex parte Graham*, 3 Washington C. C. 456 and 4

Washington C. C. 211, the court, speaking through Washington, Circuit Justice, in referring to the circuit and district courts, says:

"It is admitted that these courts, in the exercise of their common law and equity jurisdiction, have no authority, generally, to issue process into another district, except in cases where such authority has been specially bestowed by some law of the United States."

In *Picquet v. Swan*, 5 Mason 35, the opinion was delivered by Story, Circuit Justice, who stated that he followed with undoubting confidence the whole course of reasoning in *ex parte* Graham.

In *Toland v. Sprague*, 13 Peters 300, this court approves the doctrine announced in *Picquet v. Swan, supra*, and says:

"The circuit court of each district sits within and for that district, and is bounded by its local limits. Whatever may be the extent of their jurisdiction over the subject matter of suits, in respect to persons and property, it can only be exercised within the limits of the district. Congress might have authorized civil process from any circuit court to have run into any State of the Union. It has not done so. It has not, in terms, authorized any original civil process to run into any other district, with the single exception of subpoenas for witnesses, within a limited distance. In regard to final process, there are two cases, and two only, in which writs of execution can now by law be served in any other district than that in which the judgment was rendered—one in favor of private persons in another district of the same State, and the other in favor of the United States, in any part of the United States. We think that the opinion of the legislature is thus manifested to be that the process of a circuit court cannot be served without the district in which it is established, without the special authority of law therefor. If such be the inference from the course of legislation, the same interpretation is alike sustained by consideration of reason and justice. * * * *

With these views, we have arrived at the same conclusions as the Circuit Court of Massachusetts, as announced in the following propositions, viz.: 1st. That by the general provisions of the laws of the United States, the circuit courts can issue no process beyond the limits of their districts. 2d. That independently of positive legislation, the process can only be served upon persons within the same district. 3d. That the acts of Congress adopting the state process, adopt the forms and modes of service only so far as the persons are rightfully within the reach of such process, and did not intend to enlarge the sphere of the jurisdiction of the circuit court."

The doctrine laid down in the foregoing cases is also announced in the following cases:

*Chaffee v. Hayward* and *Day v. Hayward*, 20 How. 208; *In re Manning*, 44 Fed. Rep. 275; *Walker v. Lea*, 47 Fed. Rep. 645; *In re Boles*, 48 Fed. Rep. 75; *Paine v. Caldwell*, 1 *Hask.* 452, 18 Fed. Cases No. 10674; *In re Hodges*, 11 N. B. R. 369, 12 Fed. Cases No. 6502.

Prior to the opinion in the case at bar it had never been held by this court or any other federal court, in any case *in personam*, that a summons could be issued in one district for service in another district without special legislative authority therefor. This court in the opinion, in commenting on section 4 of the act of February 28, 1887, (24 Stat. 425), with reference to the division of the Eastern and Western Districts of Missouri, seems to regard as of little consequence the positive provisions of that section authorizing the sending of duplicate writs beyond the district in which the suit was brought. The court refers to this most necessary grant of power as a mere direction which accompanied the other provisions of the act. In discussing the use of the words "division or district" in this Missouri act and in the special Illinois act, the court has entirely overlooked the difference between the right to bring a suit in a particular district and

the power to issue a writ for service in another district.

It is provided by the general act of March 3, 1887, (24 Stat. 552), that "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

It is provided by the special act of March 2, 1887, (24 Stat. 442), with reference to Illinois, that "if there are two or more defendants in civil suits residing in the different divisions or districts, the action may be brought in either in which either of the defendants may reside."

It will be observed that the general act provides that *suit shall be brought* only in the district of the residence of either the plaintiff or the defendant and that the special act provides that *action may be brought* in either district in which either of the defendants may reside. Both of these acts simply provide where suit may be brought. Neither one of them authorizes the issuance of process in one district for service in another district. If the court is correct in the construction which it has placed upon the special Illinois act, then the same construction should necessarily be placed upon the general act to which we have just referred. The result of this would be to permit a plaintiff to bring a suit in his own district and send a summons for service upon a defendant in any other district in the United States. The fact that this would result clearly shows that the language of the act as to where suit shall be brought should not be construed to authorize the sending of a writ out of the district in which the suit is brought. It has been repeatedly held by the federal courts that under the act of March 3, 1887, a defendant must be found in the district of the residence of the plaintiff in order to be sued in that district.

*Bourke v. Amison*, 32 Fed. Rep. 710; *Dinzey v. Illinois Railroad Co.*, 61 Fed. Rep. 49.

All the federal courts have followed the holding announced in these cases and we have not found it questioned anywhere.

Assuming that the court was correct in holding that the special Illinois act refers to both the Northern and Southern Districts of the State and that the act was not repealed by the general act of March 3, 1887, we submit, that under the unbroken line of authorities to which we have called attention, that the court should have gone no further in its opinion than to say that under this special act the defendants in error could only have been sued in the Northern District of Illinois provided they were found in that district. The record shows that they were not served in the Northern District but were each served with a duplicate writ in the Southern District of Illinois by the marshal of that district. To sustain the jurisdiction of the circuit court in the case at bar under the special act with reference to Illinois, it is necessary for the court to legislate by reading into this act the provisions which Congress has inserted in other acts authorizing the issuing of duplicate writs out of the court in which the suit is brought for service in other districts.

II.

The special act of March 2, 1887, was repealed by the general act of March 3, 1887.

This question was not discussed by defendants in error, because they did not think that it could possibly be held that section 4 of the special act referred to the Southern as well as the Northern District of Illinois. Congress, in at least four other acts passed prior to the Illinois act, took certain counties out of one district of a state and put them into another district and then proceeded to establish divisions in the latter district just as was done by the Illinois act. In each of these acts, instead of finding the words, "divisions or districts," the language was "divisions of the district." The acts referred to are the following:

Act of January 29, 1880, (21 Stat. 62), as to Georgia; Act of February 4, 1880, (21 Stat. 63), as to Ohio; Act of June 11, 1880, (21 Stat. 175), as to Tennessee, and Act of

May 2, 1884, (23 Stat. 18), as to Alabama.

In 26 Amer. & Eng. Ency. Law (2nd Ed.) 742, the author says:

"When the latter act is exclusive, that is, when it covers the whole subject to which it relates, and is manifestly designed by the legislature to embrace the entire law on the subject, it will be held to repeal by implication all prior statutes on that matter whether they are general or special, even though they are not repugnant, unless it is expresely provided that prior special acts shall not be affected. Within this principle, when an earlier statute is special only in the sense that it applies to a single case, of which there are many in the state, and the later statute is general in its operation and applies to all such cases, then the earlier one is repealed by the later, because the whole includes the several parts."

Numerous cases are cited in the notes to the text we have quoted sustaining the author's position.

The act of March 3, 1875, as amended by the act of March 3, 1887, as corrected by the act of August 13, 1888, is an affirmative independent act, intended to recast the whole jurisdiction of the circuit courts of the United States and the first section of said act contains the following:

"And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

This provision is comprehensive enough to include and was, no doubt, intended to apply to every district in the United States. This court in *Smith v. Lyon*, 133 U. S. 315, in referring to this provision, says that it "undertakes to define the jurisdiction of each one of the circuit courts of the United States with reference to its territorial limits."

The Illinois act is special in that it only applies to districts in Illinois while the general act covers all districts in

the United States. They both relate to the jurisdiction of the court with respect to the particular district in which a defendant shall be sued. Within the rule laid down in the Amer. & Eng. Ency. Law, from which we have quoted, and the many cases therein cited, the districts of Illinois were included in said general act and the special law relating thereto was repealed by the general act.

The general act contained a clause repealing all laws and parts of laws in conflict therewith. Even if it had not contained this clause it would have operated to repeal the special Illinois act because it covers the entire subject with reference to the particular district in which a defendant may be sued and does not pretend to save the special act from its operation.

*United States v. Claflin*, 97 U. S. 546; *Union Pacific Railway Co. v. Cheyenne*, 113 U. S. 516; *The Louisville Water Co. v. Clark*, 143 U. S. 1.

The court in its opinion in the case at bar says that if the special act of Illinois was repealed by the general act of 1887, that then the special acts passed after the Judiciary Act of 1789, "never took effect or that the consequence of their passage was to destroy the provision of the judiciary act prescribing the place where civil suits might be brought which, of course, is an impossible hypothesis."

We respectfully submit that this contention of the court is not sound. The special acts referred to simply modified the general judiciary act with reference to the particular districts to which they applied and left the judiciary act in full force and effect with reference to all other districts in the United States. The special acts of course did take effect but operated only in the particular districts to which they referred and only to that extent repealed or modified the general act.

Prior to the act of March 3, 1887, if there had been a special law for each state in the Union similar to the special Illinois law, would not said act of 1887 have repealed them

all? Has it failed to repeal the Illinois act because all the states did not have a similar special law?

The last sentence in section 4 of the Illinois act is as follows:

"When the defendant is a non-resident of the district action may be brought in either division of said district wherein the defendant may be found."

This provision indicates clearly that this section was intended to refer only to the Northern District of Illinois, because there were no divisions in the Southern District.

This provision, too, is in direct conflict with the provision of the general law of March 3, 1887, which only permits suit to be brought in the district of the residence of either the plaintiff or the defendant. The Illinois act would suffer a single defendant, resident of some other state, to be sued in an Illinois district, although that district might not be the residence of the plaintiff. The differences between the two acts cannot be reconciled.

We print at the end of this petition extracts from some of the cases which we have cited and we invite the court's attention to them.

For the reasons set forth herein we again most respectfully ask that a rehearing of said cause be granted.

JOHN M. LANSDEN,
ANGUS LEEK,
DAVID S. LANSDEN, and
M. PAUL NOYES,
Attorneys for Defendants in Error.

We do hereby certify that we believe the foregoing petition is well founded and the same is not made for purposes of delay.

JOHN M. LANSDEN,
ANGUS LEEK,
DAVID S. LANSDEN, and
M. PAUL NOYES,
Attorneys for Defendants in Error.

# Extracts from Some of the Opinions Cited in the Foregoing Petition.

In *Ex parte Graham*, 3 Washington C. C. 456 and 4 Washington C. C. 211, the court, speaking through Washington, Circuit Justice, says:

"The question turns upon the authority of the district or circuit court of one district, to issue its process into any other district, to compel the appearance of a person residing or found within the latter jurisdiction, before the court from which the process issued; or to stand committed, for any alleged contempt of that court. It is admitted, that these courts, in the exercise of their common law and equity jurisdiction, have no authority, generally, to issue process into another district, except in cases where such authority has been specially bestowed by some law of the United States. The absence of such a power, would seem necessarily to result from the organization of the courts of the United States; by which two courts are allotted to each of the districts, into which the United States are divided; the one denominated a district—the other a circuit court. This division and appointment of particular courts, for each district, necessarily confines the jurisdiction of the local tribunals, within the bounds of the respective districts, within which they are directed to be holden. Were it otherwise, and the court of one district could send compulsory process into any other, so as to draw to itself a jurisdiction over persons, or things, without the limits of the district, there would result a clashing of jurisdiction between those courts, which could not easily be adjusted; and an oppression upon suitors, too intolerable to be endured. But the legislature of the United States, from abundant caution, as it would seem, has not left this subject to implication. After conferring upon those courts, respectively, the portion of jurisdiction which congress intended they should exercise, the 11th section of the act of 24th September, 1789, C. 20 (1 Stat. 73),

declares, 'that no person shall be arrested in one district, for trial in another, in any civil action, before a circuit or a district court; nor can a civil suit be brought before either of those courts, against an inhabitant of the United States, by any original process, in any other district, than that whereof he is an inhabitant; or in which he shall be found, at the time of serving the writ.' These provisions appear manifestly to circumscribe the jurisdiction of those courts, as to the person of the defendant, by the limits of the districts where the suit is brought; and that the process of those courts, was considered by the legislature, to be bounded by the same limits, is obvious from the subsequent acts passed; the one on the 2d of March, 1793, (chapter 22, sec. 6 [1 Stat. 355]), authorizing subpoenas for witnesses, to attend the courts of one district, to run into any other district, not exceeding in civil cases, one hundred miles from the place of holding the court; and the other, on the 3d of March, 1797, (chap. 74, sec. 6 [2 Bior. & D. Laws, 594; 1 Stat. 515 c. 20]), which authorizes writs of execution upon judgments obtained, at the suit of the United States, in any of their courts, in one state, to run and be executed in any other state or territory. It would seem, that these provisions were made, not because they were supposed by congress to be necessary, in consequence of the 11th section of the judiciary law; but because the jurisdiction of the courts, was essentially confined, by their organization within the limits of their respective districts; for, it is to be observed, that that section applies exclusively to original suits, and to the parties in those suits; and therefore imposed no restraint, in respect to writs of execution and subpoenas for witnesses, which could render the above provisions at all necessary."

In *Picquet v. Swan*, 5 Mason 35, the court, speaking through Story, Circuit Justice, says:

"The judiciary act of 1789(chapter 20) provides, 'that the circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature where the matter in dispute, exclusive of costs, exceeds

500 dollars, and the United States are plaintiffs, or petitioners; or an alien is a party; or the suit is between a citizen of the state, where the suit is brought, and a citizen of another state.'

As to citizens, therefore, there exists no jurisdiction, unless either the plaintiff, or the defendant is a citizen of the state, where the suit is brought. As to aliens, by which must be understood, in the language of the constitution, 'a foreign citizen or subject,' the jurisdiction is in all cases given, where an alien is a party. In a subsequent part of the same section is the clause, which has been so much commented on at the bar, 'but no person shall be arrested in one district for trial in another in any civil action before any circuit or district court. And no civil action shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that, whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.' It is observable, that the language is confined to original process, and does not apply to final process or process of execution. If this clause had not been inserted, what would have been the legal operation of the other clauses of the act? A prior section had divided the United States into certain judicial districts, whose limits generally were coextensive with the territorial limits of a single state. Within these districts a circuit court is required to be held at certain times and places prescribed by the act. The circuit court of each district sits within and for the same, and is bounded by its local limits. In the exercise of jurisdiction within those limits, the general principles of law must be presumed to apply to them all. Whatever might be the extent of their jurisdiction over the subject matter of suits, in respect to persons and property, that jurisdiction is available only within the limits of the district. The courts of a state, however general may be their jurisdiction, are necessarily confined to the territorial limits of the state. Their process cannot be executed beyond those limits; and any attempt to act upon persons or things beyond

them, would be deemed an usurpation of foreign sovereignty, not justified or acknowledged by the law of nations. Even the court of King's Bench in England, though a court of general jurisdiction, never imagined, that it could serve process in Scotland, Ireland, or the colonies, to compel an appearance, or justify a judgment against persons residing therein at the time of the commencement of the suit. This results from the general principle, that a court created within and for a particular territory is bounded in the exercise of its power by the limits of such territory. It matters not, whether it be a kingdom, a state, a county, or a city, or other local district. If it be the former, it is necessarily bounded and limited by the sovereignty of the government itself, which cannot be extra-territorial; if the latter, then the judicial interpretation is, that the sovereign has chosen to assign this special limit, short of his general authority. It was doubtless competent for congress to have authorized original as well as final process, to have issued from the circuit courts and run into every state in the Union. But it has conferred no such general authority. In a single case only has it authorized—by the statute of 3d of March, 1797, c. 74 (Folwell's Ed., vol. 3, p. 423, section 6 [I Stat. 515, c. 20])—writs of execution to run throughout the United States; and that is, upon judgments obtained for the use of the United States in any of the courts of the United States. By the act of 2d March, 1793, c. 66 (22) section 6 (1 Story's Laws, 312; 1 Stat. 335) it has also authorized subpoenas for witnesses to attend the courts of the United States to be served in other districts within certain limited distances. And until a very recent statute—Act May 20, 1826, c. 123 (3 Story's Laws, 2034; 4 Stat. 184, c. 124)—no authority existed to serve writs of execution, in favor of private persons, in any other district, than that where the judgment was rendered, although both districts were within the territorial limits of the same state. This very course of legislation, during a period of almost forty years, demonstrates the understanding of congress, as well as of the profession,

that the process of the circuit court could not be served in ordinary cases out of the limits of the judicial district for which it was established. My Brother Washington, in his able judgment in the case Ex parte Graham, has gone largely into the consideration of this doctrine; and I follow with undoubting confidence the whole course of his reasoning. * * * * If, therefore, the restraining clause already mentioned were not in the eleventh section of the act of 1789 (chapter 20) I should be of opinion for the reasons so forcibly given by my Brother Washington that the exercise of the jurisdiction of the circuit courts by compulsive process, was essentially confined, by their very organization, within the limits of their respective districts. It would otherwise follow, that final process might in all cases run into every district of the Union, since the terms of the clause apply to original process only. Yet the professional opinion and practice, as well as the positive legislation of congress in the cases above mentioned, demonstrate, that the contrary is the true construction of the act. * * * * If, therefore, I was called upon to decide this case exclusively upon principle, my judgment would lead me to adopt these conclusions: That by the general provisions of the law of the United States, the circuit courts could issue no process beyond the limits of their districts. That independent of positive legislation, the process can only be served upon persons within the same districts. That the acts of congress, adopting the state process, adopt the forms and modes of service only so far as the persons are rightfully within the reach of such process, and did not intend to enlarge the sphere of the jurisdiction of the circuit courts."

In *Bourke v. Amison,* 32 Fed. Rep. 710, the court in speaking of the act of March 3, 1887, says:

"The plaintiff contends that the language of this clause not only confers jurisdiction upon the circuit court of either district over a suit wherein the plaintiff and defendant reside in different districts, but that it also allows process of

such court to be served outside of the district. Whether the first of these propositions is or is not sound need not be now determined; whatever may have been the intention of congress as to the conferring of jurisdiction, there is not sufficient warrant in the inserted words for the claim that the process of the circuit courts should henceforth run throughout the United States, except in the particular cases, and to the extent already provided for in section 738. So extensive and extraordinary a grant of power is not to be spelled out from words which are susceptible of reasonable interpretation without being held to effect so radical a change in existing law."

In *Dinzey v. Illinois Central Railroad Co.*, 61 Fed. Rep. 49, the court says:

"In such cases the plaintiff may sue in the district wherein the defendant resides, or he may sue in the district of his own residence. In the latter event, to make the right available in the particular case, the defendant must be found, for the purpose of being served with the summons, subpoena, or other process, within the territorial limits within which the process of the court may be lawfully and effectually served upon the defendant."

# Supreme Court of the United States.

No. 49.—October Term, 1905.

Harold Petri, Carl Bopp, and Victor Poels, Co-partners, doing business under the name of Petri & Company, Plaintiffs in Error,
vs.
The F. E. Creelman Lumber Company, and Frank E. Creelman.

In error to the Circuit Court of the United States for the Northern District of Illinois.

[December 4, 1905.]

Plaintiffs in error, suing as aliens and residents of Antwerp, Belgium, commenced this action in the Circuit Court of the United States for the Northern Division of the Northern District of Illinois, to recover damages for an alleged libel. Two Illinois corporations and a number of persons were made defendants. The bill as to the corporations alleged citizenship in Illinois, and, as to all the defendants, except the Creelman Lumber Company and F. E. Creelman, one of the individual defendants, the bill alleged that the defendants resided in the district and division where the suit was brought. The Creelman Lumber Company and F. E. Creelman filed pleas to the jurisdiction of the court, based upon the fact that each of them, before and at the time of the commencement of the suit, although citizens of the State of Illinois, were residents of a different district from the one in which the suit was brought, that is, the Southern District of Illinois. To these pleas the plaintiffs demurred, and, on a hearing, a District Judge, holding the Circuit Court, overruled the demurrers, and held the pleas to the jurisdiction good. The plaintiffs electing to stand upon their demurrers to the pleas, the action as to the defendants in question was dismissed for want of jurisdiction. Some time afterwards a bill of exceptions was signed by a Circuit Judge, in which was recited the action taken by the trial court upon the demurrer to the jurisdictional pleas aforesaid, and the cause was taken to the Circuit Court of Appeals. That court, however, dismissed the writ of error, and on the receipt of its mandate, about a year after the entry of the judgment of dismissal above referred to, there was filed in the trial court a certificate of the Circuit Judge, in which was set out the proceedings had in the cause, and it was certified, for the purpose of a writ of error from this court, that the only question involved in such writ of error was one of jurisdiction. It was also certified that the judge who had heard the cause resided in the Southern District of Illinois, and was not within the territorial limits of the Northern Dis-

trict of Illinois. Cotemporaneous with the filing of the certificate a writ of error was allowed, and in the petition and assignments of errors it clearly appeared that the writ of error was prosecuted solely upon the question of jurisdiction arising from overruling of the demurrers to the pleas to the jurisdiction.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

A motion to dismiss the writ of error first requires our attention. It is urged that the writ should be dismissed because the bill of exceptions filed below and the certificate made as to the question of jurisdiction on this writ of error were authenticated by a judge other than the trial judge, and further, because the certificate was not made at the term in which the judgment complained of was entered. We are relieved, however, from the necessity of considering these objections, for the reason that the judgment of dismissal and the prior proceedings clearly exhibit the ground upon which the judgment was based, and plainly make apparent on the record the fact that the only matter tried and decided in the Circuit Court were demurrers to pleas to the jurisdiction, and that the petition upon which the writ of error was allowed asked only for the review of the judgment, which decided that the court had no jurisdiction of the action. This being the state of the record, no bill of exceptions or formal certificate in respect to the matter decided was required, and the question of jurisdiction alone was sufficiently certified to this court, as required by the act of March 3, 1891. (26 Stat. 828, chap. 517, sec. 5;) *Interior Construction & Improvement Company* v. *Gibney*, 160 U. S. 217, and cases cited; *Chappel* v. *United States*, 160 U. S. 507.)

We pass then to a consideration of the merits. The plaintiffs in error insist that the Circuit Court for the Northern Division of the Northern District of Illinois had jurisdiction over the defendants, who, being citizens of Illinois, were residents of the Southern District of that State, because such jurisdiction was expressly conferred by section 740, Rev. Stat. and by the terms of a special act relating to the judicial districts in Illinois, approved March 2, 1887. (24 Stat. 442.) On the contrary, in effect, the defendants in error maintain that the court below rightly held that it had no jurisdiction over the defendants who resided in the Southern District of Illinois, because section 740 of the Revised Statutes had been repealed, by the Judiciary Acts of March 3, 1875, (18 Stat. 470,) and March 3, 1887, (24 Stat. 552,) as corrected by the act of August 13, 1888, (25 Stat. 432,) and because no such jurisdiction was given by the special act of March 2, 1887, and if it was conferred by that act, the act was repealed by the Judiciary Act of March 3, 1887.

In order, as far as may be, to narrow the question for decision to the case before us, we shall come first to consider the contentions concerning jurisdiction, based on the special act of March 2, 1887, which deals alone with the State of Illinois, since, if we conclude that that act gave the jurisdiction and has not been repealed, we will be relieved of the necessity of determining whether the general provision (Rev. Stat. 740), applicable to all States having more than one judicial district, is yet in force.

In approaching the consideration of the special act relating to the Illinois districts we shall assume, for the purposes of such consideration, that the provisions of section 740, Rev. Stat., were repealed by any or all of the Judiciary Acts of March 3, 1875, and the act of March 3, 1887, as corrected by the act of August 13, 1888.

In coming to consider the special act two questions arise: 1. Did the terms of that act give jurisdiction to the Circuit Courts of the United States in Illinois as to all the defendants in a civil action where there were two or more such defendants residing in different districts of the State? 2. If the act conferred such jurisdiction, was it repealed at the time of the bringing of the action.

First. The special act of March 2, 1887, was entitled "An act to amend section 536 of the Revised Statutes of the United States, relating to the division of the State of Illinois into judicial districts." At the time of the passage of this special act there were two judicial districts in the State of Illinois, the Northern and the Southern. The first section of the act took certain counties from the Southern District and added them to the Northern District. The second section divided the Northern District as enlarged into two divisions. The third section fixed the place and times of holding courts in said divisions of the Northern District. The fourth section, relating to jurisdiction, was as follows:

"SEC. 4. That all civil suits not of a local nature, and criminal prosecutions, must be brought in the division of the said Northern District of Illinois where the defendant or defendants reside or the offense is committed; but if there are two or more defendants in civil suits residing in the different divisions or districts the action may be brought in either in which either of the defendants may reside. When the defendant is a non-resident of the district action may be brought in either division of said district wherein the defendant may be found."

The remaining sections contain provisions rendered necessary by the change in both districts and the subdivision of the Northern District.

The first part of the opening sentence of section 4 clearly lays down the general rule controlling suits against residents of the Northern District, and directs in what division of that district suit may be brought. This general rule being thus laid down, the sentence proceeds to carve out an exception in the following language: ". . . but if there are two or more defendants in civil suits residing in different divisions or districts,

the action may be brought in either in which either of the defendants may reside." In other words, the exception plainly confers jurisdiction, in the cases for which it provides, upon the courts of either district, and as to such exception gives the right to bring the suit in either district, and if brought in the Northern District requires it to be brought in the division of that district in which one of the defendants resided. The text making this provision is free from ambiguity, and, if its plain import be followed, is decisive, But the argument is that the words "or district," contained in the sentence, were manifestly a mistake, and should be read "of the district," so as to cause the sentence to read as follows: but if there are two or more defendants in civil suits residing in the different divisions of the district, the action may be brought in either in which either of the defendants may reside. To adopt this view, however, would compel us to strike out the word "or" and insert in its stead the words "of the," and to strike out the word "districts" and insert in its stead the word "district." To do this would be not interpretation, but legislation. It is insisted, however, that this would not be the case, because to thus restrict the section in question is compelled by a consideration of the subject with which it dealt and the purpose which Congress had in mind in enacting the statute; that is to say, the argument is that, as by the act the purpose of Congress was only to divide the Northern District of Illinois into two divisions and to deal exclusively with the district thus subdivided, therefore the words used must be construed so as to cause them to relate exclusively to such subject matter. This argument, however, misconceives the avowed purpose of the act as shown by its title and its context. The title, as we have seen, expressly purported to deal with and amend the section of the Revised Statutes creating two judicial districts in Illinois, and the very first section of the act dealt with the Southern as well as with the Northern District. And that the mind of Congress was addressed to the existence of two districts in the State, and that the wisdom of legislating on that basis was present to its mind, is shown, not only by the provisions in question, but by the subsequent sections of the act, wherein frequent mention is made of both districts.

And the error of the assumption, that because the act of Congress primarily provided for the division of the Northern District, therefore that body could not have contemplated a provision concerning the right of election to bring a suit in either of the districts of the State where two or more defendants resided in the different districts, is refuted by legislation enacted at the same session of Congress in which the Illinois act was passed—that is, by an act approved February 28, 1887—two days before the approval of the Illinois act dividing the Eastern and Western Districts of Missouri into divisions, in which act it was provided in the fourth section as follows (24 Stat. 425):

"SEC. 4. That hereafter all suits to be brought in the courts of the United States in Missouri, not of a local nature, shall be brought in the division having jurisdiction over the county where the defendants, or either of them, reside; but, if there be more than one defendant, and a part of them reside in different divisions or districts of said State, the plaintiff may sue in either division of either district where one of such defendants resides, and send duplicate writs to the other division or district, directed to the marshal of said district, on which said writs shall be indorsed, by the plaintiff or his attorney, that the same is a duplicate of the original writ sued out of the court of the proper division and district. . . ."

Now, it will be observed that Congress in this provision uses the very words found in the Illinois act, accompanied with such directions as to service of process as leaves no possible room for contention that the words "division or district" were used by Congress as synonymous and without a comprehension of the plain distinction which existed between them. And, as we shall proceed hereafter to demonstrate, the prior and subsequent legislation of Congress relating to the division of States into judicial districts, or of a judicial district into divisions, all demonstrate that in enacting such legislation Congress usually deemed it wise to provide for joining in a single action in either district a number of defendants residing in the particular State, but in different districts thereof.

Holding, as we do, that the special act of 1887, as to Illinois, conferred jurisdiction upon a court of either district in a civil cause wherein two or more defendants resided in different districts in the State, we are brought to consider the second question, which is, was the act in question repealed by the act of March 3, 1887, as corrected by the act of August 2, 1888?

As previously said, we assume, for the purposes of the argument, that the effect of the Judiciary Act of March 3, 1875, was to repeal section 740 Rev. Stat., conferring in general terms throughout the United States the character of jurisdiction referred to, and we also concede, for the sake of the argument, that if the act of 1875 had not caused a repeal of section 740, the act of March 3, 1887, as corrected by the act of March 13, 1888, did so. Does it follow from these concessions, however, that the Judiciary Act of March 3, 1887, as corrected, repealed the special act, which was approved only one day before the approval of the Judiciary Act of 1887?

Undoubtedly the act of 1887, in the first section thereof, declared the general rule to be that no civil suit should be thereafter brought in a Circuit or District Court by any original "process of [or] proceeding" in any other district than that whereof the defendant was an inhabitant, and that where the jurisdiction was founded only on the fact that the action was between citizens of different States, suit should be brought only in the district of the residence of either the plaintiff or defendant. So, also, the act contained a general clause repealing all laws and parts of laws in conflict with the provisions of the act.

It is elementary that repeals by implication are not favored, and that a repeal will not be implied, unless there be an irreconcilable conflict between the two statutes. And especially does this rule apply where the prior law is a special act relating to a particular case or subject and the subsequent law is general in its operation. To hold, then, that the general terms of the act of 1887 repealed the special and particular provisions of the act of 1887, relating to the districts in Illinois, we must conclude that there was such conflict between the two that it cannot reasonably be inferred that Congress intended that the two should coexist.

The conclusion, in effect, therefore, would have to be that it cannot be supposed that Congress intended, when it legislated generally concerning the jurisdiction of the courts of the United States, to leave in force a special act as to the districts in Illinois, which would take those districts out of the general rule otherwise governing elsewhere. But to adopt this proposition would compel us to ignore the entire course of legislation by Congress concerning the courts of the United States from the beginning, both prior to and after the adoption of the general act of 1887. By the original Judiciary Act (1 Stat. 79) suits were permitted to be brought, either in a Circuit or District Court, in the district whereof the defendant was an inhabitant or wherein he was found at the time of serving the writ. Each State then practically constituted a single judicial district. Whilst this general provision was in force many special acts were passed by Congress creating more than one district in a State, and providing that where a suit was brought against two or more defendants residing in different districts in a State, the plaintiff might sue in either district. See Act of June 18, 1838, sec. 4, as to Mississippi districts, 5 Stat. 248; Act of January 18, 1839, sec. 7, as to Tennessee, 5 Stat. 314; Act of February 6, 1839, sec. 5, as to Alabama, 5 Stat. 315; Act August 11, 1848, sec. 5, as to Georgia, 9 Stat. 281; Act March 3, 1849, sec. 3, as to Iowa (State made into divisions) 9 Stat. 411; and Act February 10, 1855, sec. 9, as to Ohio, 10 Stat. 606.

If the theory of irreconcilability between such statutes and the existence of a general provision to the contrary necessarily involved in the argument to establish that the special Illinois statute was repealed by the act of 1887 be sound, it must follow that either these special acts, passed long after the Judiciary Act of 1789, never took effect, or that the consequence of their passage was to destroy the provision of the judiciary act, prescribing the place where civil suits might be brought, which, of course, is an impossible hypothesis.

Now, it was not until May 4, 1858, (11 Stat. 272,) that a general law was passed, making a provision like unto that contained in the special acts to which we have referred, of general application throughout the United States; and it was this general provision which was subsequently incor-

porated into section 740, Rev. Stat. And, even after the passage of the act of 1858, in at least one special act, Congress incorporated a like provision to that we have been considering. (Act Feb. 24, 1863, sec 9, as to Michigan, 12 Stat. 662.)

And the refutation of the argument of inherent incompatibility between a general rule regulating jurisdiction and a special act departing from that rule as to a particular State which results from a consideration of the legislation of Congress from the beginning to the time of the adoption of the act of 1875, likewise results from a consideration of the legislation since that act. Thus, under the contention, which we have assumed to be sound, the effect of the passage of the act of 1875 was to repeal the provisions of section 740, Rev. Stat. This being the case, it resulted that the act of 1875 announced the general rule as to jurisdiction, which was in conflict with the rule theretofore generally prevailing under the terms of section 740, Rev. Stat. But that Congress did not deem that a special provision as to a particular State or States was irreconcilable with the existence of the general rule, is conclusively shown by the fact that after the adoption of the act of 1875 various special acts were passed dividing particular States into two or more districts, or dividing a district or districts into divisions, and expressly declaring that in civil suits, not of a local nature, two or more citizens of the State might be joined as defendants, although residing in different districts of the State, and that suit might be brought in either district. See Act as to Louisiana, 1881, 21 Stat. 507, sec. 2; as to Mississippi, 1882, 22 Stat. 102, sec. 3; as to Missouri, Feb. 28, 1887, sec. 4, 24 Stat. 425. To which may be added the statute relating to Illinois, which we are considering.

Indeed, the legislation of Congress since the passage of the act of 1887, under the hypothesis of the repeal of section 740, Rev. Stat., by that act, also demonstrates that it was considered that the passage of a special statute as to a particular State, vesting jurisdiction in the courts of either district within the State, where two or more defendants resided in different districts therein, was not irreconcilable with the existence of a general rule to the contrary in a statute having a general operation. This is shown by the fact that a special law of the character stated has been enacted as recently as 1894. (Act as to Mississippi, 28 Stat. 115, sec. 4.) The subject matter dealt with by that act—viz., the division of a judicial district of Mississippi into minor subdivisions—is like unto the Illinois act which we are considering, and the identical language used in the Illinois act, "division or district," is also found in the Mississippi act, accompanied, however, with a provision leaving no possible room to contend that it was not the intention of Congress to allow the joinder in one action of defendants residing in different districts within the State. Section 4 of the act reads as follows:

"SEC. 4. That if there be more than one defendant in a cause and the defendants reside in different divisions of the said Southern District, or any of the defendants reside in the Northern District, the plaintiff may sue in either division or district where any defendant resides, and send duplicate writs for the other defendant or defendants to the other division or district where such defendant or defendants reside, and said writs, when executed and returned into the court from which they issued, shall constitute one suit and be proceeded in accordingly."

Concluding, as we do, that the special act of March 2, 1887, relating to the judicial districts of Illinois, was in force at the time of the bringing of this action and still remains in force, and that by the terms of section 4 of the act and under the pleadings in the action jurisdiction was conferred upon the Circuit Court of the Northern Division of the Northern District of Illinois over all the defendants named in the declaration, as well those residing in the Southern District as those residing in the Northern District of Illinois, it follows that the court below erred in overruling the demurrers to the pleas to the jurisdiction and rendering judgment of dismissal, and such judgment must, therefore, be reversed and the cause remanded for further proceedings.

*Reversed.*

True copy.

Test:

*Clerk Supreme Court, U. S.*